DOCKET

No. 88-616-CFX
Status: GRANTED

Title: Louis W. Sullivan, Secretary of Health and Human Services, Petitioner
v.
Elmer Hudson

Docketed:
October 12, 1988

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Ebbinghouse,Richard J., Coleman Jr.,James E.

Entry	Date	Note	Proceedings and Orders
1	Aug 11 1988	G	Application (A88-129) to extend the time to file a petition for a writ of certiorari from August 22, 1988 to September 12, 1988, submitted to Justice Kennedy.
2	Aug 11 1988		Application (A88-129) granted by Justice Kennedy extending the time to file until September 12, 1988.
3	Sep 1 1988	G	Application (A88-129) to extend further the time to file a petition for a writ of certiorari from September 12, 1988 to October 12, 1988, submitted to Justice Kennedy.
4	Sep 9 1988		Application (A88-129) granted by Justice Kennedy extending the time to file until October 12, 1988.
5	Oct 12 1988	G	Petition for writ of certiorari filed.
6	Nov 15 1988	X	Brief of respondent Elmer Hudson in opposition filed.
7	Nov 16 1988		DISTRIBUTED. December 2, 1988
8	Dec 5 1988		Petition GRANTED.
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9	Jan 4 1989	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
11	Jan 13 1989		Record filed.
		*	Certified copy of original record and proceedings, volumes I thru III received.
10	Jan 17 1989		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
12	Jan 19 1989		Brief of petitioner Otis R. Bowen filed.
14	Feb 21 1989		Order extending time to file brief of respondent on the merits until March 20, 1989.
15	Mar 8 1989		SET FOR ARGUMENT, APRIL 17, 1989. (1st CASE)
16	Mar 10 1989	D	Motion of the Acting Solicitor General to permit Amy L. Wax, Esq. to present oral argument pro hac vice filed.
17	Mar 20 1989		Motion of the Acting Solicitor General to permit Amy L. Wax, Esq. to present oral argument pro hac vice DENIED.
18	Mar 20 1989		Brief of respondent Elmer Hudson filed.
19	Mar 28 1989		CIRCULATED.
20	Apr 10 1989	X	Reply brief of petitioner Elmer Hudson filed.
21	Apr 17 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

88-616

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ELMER HUDSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether Social Security administrative proceedings conducted after a remand from the courts are "adversary adjudications" for which attorney fees are available under the Equal Access to Justice Act, 5 U.S.C. 504(a)(1) and 28 U.S.C. 2412(d)(3).

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

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v.

ELMER HUDSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 839 F.2d 1453. The opinion of the district court (App., *infra*, 17a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 45a-46a) was entered on March 14, 1988. A petition for rehearing was denied on May 24, 1988 (App., *infra*, 47a). On August 11, 1988, Justice Kennedy extended the time for filing a petition for a writ of certiorari to September 12, 1988, and on September 9, 1988, he further extended

that time to and including October 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412(d), provides in pertinent part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust [5 U.S.C. 504(a)(1)].
>
> "adversary adjudication" means an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise * * * [5 U.S.C. 504(b)(1)(C)].
>
> In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such [an] adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust [28 U.S.C. 2412(d)(3)].

STATEMENT

1. This is an Equal Access to Justice Act (EAJA) attorney fees case arising out of a claim for Social Security and Supplemental Security Income disability benefits. In the underlying controversy, the Secretary denied respondent's application for disability benefits, on the ground that her impairments did not prevent her from performing work similar to her previous employment (App., *infra*, 37a). The district court affirmed, finding that the Secretary's decision was supported by substantial evidence (*id.* at 43a-44a). The court of appeals, however, reversed on the ground that the Secretary had (1) failed to consider the combined effect of respondent's impairments and (2) failed to explain the weight accorded to the evidence considered. The case was remanded to the Secretary with instructions to consider respondent's impairments in combination and to articulate the reasons for the decision with greater specificity (*id.* at 35a-42a).

Pursuant to the court's remand order, the Appeals Council, acting for the Secretary, vacated its prior denial of benefits and remanded the case to an Administrative Law Judge (ALJ) for further proceedings consistent with the court's decision. The Appeals Council instructed the ALJ to "provide the claimant an opportunity to testify at a supplemental [h]earing and to submit additional evidence" (App., *infra*, 31a). The Appeals Council also directed the ALJ to apply recently revised regulations on mental impairments, and suggested that "[h]e may wish to obtain the testimony of a medical advisor" in this connection (*ibid.*).[1]

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[1] While this case was pending in the courts, respondent had filed a new application for disability benefits covering the period at issue here as well as an additional period of time. In reviewing this new claim for benefits, the ALJ, apparently unaware that the prior administrative decision was under judicial review, reopened the prior administrative

The ALJ accordingly held a supplemental hearing, at which a psychiatrist testified at the ALJ's request about respondent's mental condition (App., *infra*, 27a). Based on that expert testimony and other evidence in the record, the ALJ found that respondent had a disabling mental impairment (*id.* at 24a-29a). The Appeals Council adopted the ALJ's recommended decision and instructed the Social Security Administration to pay respondent disability benefits (*id.* at 21a-23a).

2. Respondent then petitioned the district court for an award of attorney fees under EAJA. The district court found that the Secretary's position in the litigation had been "substantially justified" and denied the petition (App., *infra*, 17a-20a). The court of appeals again reversed. Concluding that the Secretary had failed to comply with applicable disability regulations, the court of appeals held that the district court abused its discretion in finding the Secretary's position substantially justified. Turning to the question of the amount of fees to be awarded, the court held that respondent was entitled to fees not only for work performed by her attorney in the judicial review proceedings before the district court and the court of appeals, but also was entitled to recover fees for work performed in the post-remand administrative proceedings. The court recognized that 5 U.S.C. 504(b)(1)(C) limits the availability of an EAJA administrative fee award to representation in an adversary agency adjudication in which the position of the United States is represented by counsel or otherwise. The court nevertheless asserted that once the Secretary has taken the position through counsel in the district court that the claimant is not entitled to benefits, all subsequent proceedings are necessarily adversarial. In the court's view (App., *infra*, 15a), the fact that "the Secretary chooses not to have representation on remand * * * does not change our belief that the proceeding has become adversarial." The court directed the district court, on remand, to determine the amount of the fee award (*id.* at 11a n.6).

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decision and found that respondent had been disabled for the entire period at issue in that case. In its remand order in this case, the Appeals Council noted that the ALJ lacked jurisdiction to reopen a claim that is before the courts for review, and accordingly directed fresh consideration of respondent's entitlement to benefits for the period covered by the reopening (App., *infra*, 30a-31a).

REASONS FOR GRANTING THE PETITION

The decision below would extend the Equal Access to Justice Act to thousands of non-adversarial administrative proceedings that Congress manifestly intended to exclude from the statute's coverage. This Court and every other court of appeals to address the issue has recognized that Social Security administrative proceedings are fundamentally non-adversarial in character. The courts of appeals have thus uniformly held that Social Security administrative proceedings are not "adversary adjudications" within the meaning of EAJA. This case is the first to hold that a different rule applies when the proceedings are conducted pursuant to a remand from the courts.

In departing from the well-settled judicial construction of EAJA, the court below has extended the waiver of sovereign immunity contained therein far beyond the scope intended by Congress. The court's opinion invites a flood of new attorney fee claims that will vastly increase the cost and administrative burdens of the statute Congress enacted—all on the basis of the patently erroneous notion that the government's adversarial posture in the courts somehow infects post-remand proceedings in which the government is not represented by counsel and does not even present a position to the decisionmaker. Further review by this Court is therefore plainly warranted.

1. The Eleventh Circuit's decision is inconsistent with this Court's established view that Social Security administrative proceedings are not adversarial, and conflicts with a long line of appellate precedent holding that these proceedings are not "adversary adjudications" within the meaning of EAJA's fee-shifting provisions. In *Richardson* v. *Perales*, 402 U.S. 389, 403 (1971), the Court stressed that the Social Security Administration "operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary." The agency's ALJs are instructed not to press a position on the government's behalf; rather, they are charged with a special duty of inquiry to develop, on the *claimant's* behalf, a full and fair administrative record. *Id.* at 410; *Heckler* v. *Campbell*, 461 U.S. 458, 471 & n.1 (1983) (Brennan, J., concurring).[2] The agency is not "represented" by counsel or otherwise in these proceedings and thus takes no "position" on whether or not a claimant is entitled to benefits.

In keeping with this settled understanding, Congress in enacting EAJA emphasized that it did not view Social Security administrative proceedings as "adversary adjudications" for which an attorney fee award would be available. It explained (H.R. Conf. Rep. 96-1434, 96th Cong., 2d Sess. 23 (1980)):

> [The statute] defines adversary adjudication as an agency adjudication defined under the Administrative Procedure Act where the agency takes a position through representation by counsel or otherwise. It is intended that this definition precludes an award in a situation where an agency, *e.g.*, the Social Security Administration, does not take a position in the adjudication.

[2] For example, in this case on remand the ALJ called an expert to testify concerning respondent's psychiatric problems, as the Appeals Council had suggested.

Not surprisingly, therefore, the courts of appeals have heretofore uniformly held that Social Security administrative proceedings are excluded from EAJA's coverage. *McGill* v. *Secretary of HHS*, 712 F.2d 28, 30 (2d Cir. 1983), cert. denied, 465 U.S. 1068 (1984); *Miller* v. *United States*, 753 F.2d 270, 275 n.3 (3d Cir. 1985); *Guthrie* v. *Schweiker*, 718 F.2d 104, 107 (4th Cir. 1983); *Clifton* v. *Heckler*, 755 F.2d 1138, 1142-1143 (5th Cir. 1985); *Berman* v. *Schweiker*, 713 F.2d 1290, 1296 (7th Cir. 1983); *Cornella* v. *Schweiker*, 728 F.2d 978, 988-989 (8th Cir. 1984); *Wolverton* v. *Heckler*, 726 F.2d 580, 583 (9th Cir. 1984).

The Eleventh Circuit, in the decision below, is the first court of appeals to hold to the contrary.[3] The court advanced two reasons for so ruling. First, it asserted that the government's decision to contest a claimant's entitlement to benefits in district court necessarily converts any subsequent administrative proceeding on remand into an adversary adjudication. Second, it observed that previous decisions holding that fees could not be recovered for work on remanded Social Security administrative proceedings had been decided before Congress reenacted and amended EAJA in 1985. Neither of these reasons, however, offers a tenable basis for distinguishing prior precedent.

(a) There is no basis for concluding that administrative proceedings conducted after a judicial re-

[3] But see *Baeder* v. *Heckler*, 826 F.2d 1345, 1347 (3d Cir. 1987) (stating in dicta that, in determining EAJA award, "district court may also consider the time expended by [claimant's] counsel, following remand, in connection with obtaining [social security disability] benefits").

mand should be treated any differently than those conducted before. The Eighth Circuit, in *Cornella* v. *Schweiker*, 728 F.2d at 988, has addressed precisely this contention and, in direct opposition to the Eleventh Circuit's decision, held that:

> In the [Social Security] remand proceedings at the agency level, the United States was not represented by counsel and therefore an adversary adjudication was not conducted within the language of the [EAJA] statute.

Thus the Eleventh Circuit's position on the question whether post-remand administrative proceedings should be treated differently than other administrative proceedings squarely conflicts with the position of the Eighth Circuit.[4]

Moreover, the Eleventh Circuit's conclusion fundamentally misconstrues the nature of a judicial remand and the obligations that a remand order places upon the affected administrative agency. This Court has made clear that an administrative agency or any other inferior tribunal has no power to deviate from a mandate issued by a higher court. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *Briggs* v. *Pennsylvania R.R.*, 334 U.S. 304, 306 (1948); *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 168 (1948). Thus, if the Secretary disagrees with the court's decision ordering a remand and wishes to continue to contest that decision in an adversarial setting, his recourse is to seek review of that decision in an appeal to a higher court. See *e.g.*, *Cohen* v. *Perales*, 412 F.2d 44, 48 (5th Cir. 1969), rev'd on other grounds *sub nom. Richardson* v. *Perales*, 402 U.S. 389 (1971); *Stone* v. *Heckler*, 722 F.2d 464, 467 (9th Cir. 1983). If the Secretary does not appeal, however, then the court's resolution of disputed issues is binding on the Secretary and is no longer open to adversarial litigation on remand. In fact, the Social Security Administration's procedures treat cases before the agency on remand precisely like cases on initial review.

[4] In *Kelly* v. *Bowen*, Nos. 87-1999 and 87-2164EA, the Eighth Circuit has requested supplemental briefing on whether the 1985 EAJA amendments call into question its 1984 decision in *Cornella*. For the reasons discussed *infra*, we have argued in *Kelly* that the 1985 reenactment of EAJA did not alter in any way the "adversary adjudication" provisions of the original EAJA that were construed in *Cornella*. We will forward to the Court any decision rendered in *Kelly* as soon as we receive it.

The facts of this case underscore the Eleventh Circuit's error in concluding that post-remand proceedings are adversarial. Here, the Appeals Council, acting pursuant to the court's remand, vacated its prior denial of benefits and instructed an ALJ to conduct a new hearing. At that hearing, the government presented no evidence, was not represented by an attorney or any other agent, and in no way expressed a "position" on respondent's entitlement to benefits. Instead, the ALJ, acting as an adjudicator and not an adversary or advocate for the government, helped the respondent establish an evidentiary record by soliciting the testimony of a medical advisor, which testimony provided an essential basis for finding respondent disabled. Nothing in these post-remand proceedings lends the slightest support to the view that the Secretary's adversarial position in the district court continued to influence the proceedings on remand.

Those proceedings also demonstrate another difficulty with the court of appeals' reading of the statute. Fees are available under EAJA only if the government's position in the adversarial proceeding is not substantially justified. See 28 U.S.C. 2412(d)(3) (providing that court may award fees for work performed at administrative level only upon

specific finding that agency position in administrative adjudication was not substantially justified). The government's position at each stage of the proceedings must be considered separately under that statutory standard. Cf. *Russell* v. *National Mediation Board*, 775 F.2d 1289, 1291 n.8 (5th Cir. 1985) (court must determine whether government was substantially justified in litigating fee petition before awarding fee for such litigation); *Rawlings* v. *Heckler*, 725 F.2d 1192, 1196 (9th Cir. 1984) (same); but see *Trichilo* v. *Secretary of HHS*, 823 F.2d 702, 707-708 (2d Cir. 1987). Therefore, in order to decide whether a claimant is entitled to fees for work performed before the agency on remand, it would be necessary to determine whether the agency position on the remand was substantially justified. It is difficult if not impossible, however, to imagine how such an inquiry would proceed, because the agency has taken *no* position on remand. Indeed, frequently (as here), changes in the applicable regulations or in the claimant's condition will have so substantially affected claimant's situation that the issues that the agency adjudicators find dispositive on the remand will bear little or no relation to the agency's position in the judicial proceeding. In fact, to the extent that an agency position on the remand can be discerned in this case it was that respondent was entitled to benefits.

(b) The court of appeals also erred in suggesting that the legislative history of the 1985 EAJA warrants a departure from prior precedent barring the application of EAJA to Social Security administrative proceedings.

When EAJA was enacted in 1980, it was effective only until October 1, 1984; it was subsequently reenacted in amended form in 1985 (see 42 U.S.C. 2412 note). Before the reenactment, consistent appellate court precedent had interpreted the 1980 Act's definition of "adversary adjudication" as excluding Social Security administrative

proceedings (see cases cited page 7, *supra*).[5] The only amendment to that term provided that adversary adjudication was to include proceedings before an agency's board of contract appeals. See Pub. L. No. 99-80, § 1, 99 Stat. 183, 184, amending 5 U.S.C. 504(b)(1)(C). As this Court recently reaffirmed in *Pierce* v. *Underwood*, No. 86-1512 (June 27, 1988), slip op. 13, which was decided shortly after rehearing en banc was denied in this case, congressional reenactment of statutory language that has been given a consistent judicial interpretation "of course, generally includes the settled judicial interpretation. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978)."

The court below ignored this principle, concluding instead that the legislative history of the 1985 Act indicated that Congress intended to include within the definition of adversary adjudication all proceedings conducted after the agency has taken a position on the merits. This analysis of the legislative history of the 1985 act is also flatly inconsistent with *Pierce* v. *Underwood, supra*.

In *Underwood*, this Court rejected an argument, based on the same House Report on which the court below relied (H.R. Rep. 99-120, 99th Cong., 1st Sess. (1985)), that the 1985 reenactment had changed the meaning of the statutory standard of "substantial justification." As the Court explained (slip op. 13), the 1985 House Report can-

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[5] The Secretary's regulations (48 Fed. Reg. 45251, 45253 (1983)), as well as model EAJA rules promulgated by the Administrative Conference of the United States (46 Fed. Reg. 32900, 32912 (1981)) also made clear that adversary adjudications under EAJA were limited to proceedings in which the agency, "is presented by an attorney or other representative who enters an appearance and participates in the proceeding"—a definition that excludes Social Security administrative proceedings.

not be an authoritative expression of what the 1985 Congress intended,

> because it is not an explanation of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress though it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation. (Quite obviously, reenacting precisely the same language would be a strange way to make a change.)

Exactly the same analysis should apply to the statutory language at issue here.

In any event, the 1985 legislative history as a whole unmistakeably evidences a congressional intent to preserve the settled judicial constructon of the term "adversary adjudication." In 1984, the Senate Judicial Committee reported a bill that would have defined adversary adjudications to include "hearings pursuant to section 205 and section 1631 of the Social Security Act." S. Rep. 98-586, 98th Cong., 2d Sess. 1-2 (1984).[6] The House Judiciary Committee, however, considered and rejected a similar provision (130 Cong. Rec. H9301 (daily ed. Sept. 11, 1984) (remarks of Rep. Morrison)) and the provision was subsequently deleted from the 1984 bill passed by Congress. See 130 Cong. Rec. S13299 (daily ed. Oct. 3, 1984) (remarks of Sen. Heflin). After the President vetoed

[6] Hearings conducted pursuant to Section 205(g) of the Social Security act (42 U.S.C. 405(g)) and Section 1631(c)(3) of the Social Security Act (42 U.S.C. 1383(c)(3)) include, inter alia, administrative hearings conducted on remand from the courts.

the 1984 EAJA reauthorization[7], Congress took up the matter again in 1985. The 1985 legislation included no provision similar to the one in the 1984 Senate bill; it instead continued to limit adversary adjudications to proceedings "in which the position of the United States is represented by counsel or otherwise". Pub. L. No. 99-80, § 1, 99 Stat. 183, 184, amending 5 U.S.C. 504(b)(1)(C).

The legislative history thus shows that Congress specifically rejected a proposal to extend EAJA to Social Security administrative proceedings, including those on remand. Even congressional proponents of the rejected proposals acknowledged that the 1985 legislation would not permit fee awards for any administrative hearings; and there was no suggestion that hearings on remand were an exception to the general rule.[8] Senator Heflin, for example, actively supported an amendment that would have extended EAJA to Social Security administrative proceedings. See 130 Cong. Rec. S13299 (daily ed. Oct. 3, 1984) (remarks of Sen. Heflin). Nonetheless, in the floor debate on the 1985 legislation ultimately enacted into law, Senator Heflin noted that "provisions covering Social Security Act proceedings at the administrative hearing level are unable to be incorporated because of institutional opposition;" he therefore stated that, "While I believe this is an area ripe for protection, political realities dictate otherwise. And this seems to be a fight which will have to be fought another day." 131 Cong. Rec. S20350 (daily ed. July 24, 1985) (remarks of Sen. Heflin).

[7] See President's Memorandum of Disapproval, 20 Weekly Comp. Pres. Doc. 1815 (Nov. 9, 1984).

[8] Since remand hearings are a significant part of the administrative process, it is hardly likely that they were simply overlooked by those considering the scope of the bill.

The decision below completely ignores this legislative history. Instead, it focuses on a congressional statement, repeating a point made in the 1980 legislative history, that "[i]f * * * the agency does take a position at some point in the adjudication, the adjudication would then become adversarial." H.R. Rep. 99-120, 99th Cong., 1st Sess. Pt. 1, at 10 (1985) and H.R. Conf. Rep. 96-1434, 96th Cong., 2d Sess. 23 (1980).[9] The court read this language as requiring that if the government has challenged the claimant's position in district court litigation, it must be deemed to have taken a position in any administrative proceedings that occur thereafter.

The court of appeals' interpretation of this brief and ambiguous[10] bit of legislative history is possible only if it is taken completely out of context. In context, it is clear that the 1985 report was referring to an experimental representation program, since discontinued, in which the Secretary was represented by counsel in administrative proceedings.[11] As the cited report explains (H.R. Rep. 99-120,

[9] Remarkably, although the court recognized (App., *infra*, 14a, n.8) that the 1985 House Report was simply quoting the 1980 Conference Report, it interpreted that quotation as evidence that Congress intended to adopt a broadened definition of adversary adjudication in 1985 (*id.* at 13a-14a).

[10] It is, for example, far from clear that the term "adjudication" refers to the entire process to determine the claimant's entitlement to benefits, rather than just to the particular judicial or administrative proceeding at which the agency is represented. In context, it is evident that Congress was referring only to an agency adjudication, i.e., a proceeding in which the agency was represented, not to the entire process.

[11] The representation program is described in *Salling* v. *Bowen*, 641 F. Supp. 1046 (W.D. Va. 1986), vacated as moot, No. 86-212 (4th Cir. June 15, 1987), in which the district court enjoined the continuation of the project (implemented in five regional offices), principally on the ground that it violated statutory requirements that Social Security

99th Cong., 1st Sess. Pt. 1, at 10 (1985)):

> While this language [defining adversary adjudication] generally excludes Social Security administrative proceedings from the Act, Congress made clear in 1980 that "If * * * the agency does take a position at some point in the adjudication, the adjudication would then become adversarial," and thus be subject to the Act. It is the Committee's understanding that the Secretary of Health and Human Services had implemented an experiment in five locations in which the Secretary is represented at the hearing before the administrative law judge. This is precisely the type of situation covered by section 504(b)(1)(C).

That only Social Security proceedings conducted under this experimental program were covered by EAJA is confirmed by remarks of the Chairman of the House Ways and Means Committee, Rep. Rostenkowski (*Equal Access to Justice Act Amendments: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 118 (1985)):

> It is true that the Equal Access to Justice Act has been extended to cover the five adversarial hearing experiments that SSA is currently undertaking, in which the government is represented at the ALJ hearing.

administrative proceedings be non-adversarial (641 F. Supp. at 1071-1073). In light of this opinion and experience with the project, the Secretary decided, after filing an appeal in *Salling*, to discontinue the project. Accordingly, on May 7, 1987, the Secretary revoked the project's authorizing regulations, thereby mooting the case. See 52 Fed. Reg. 17286. There are now no administrative proceedings under Title II or Title XVI of the Social Security Act in which the Secretary, acting through an attorney or any other representative, enters an appearance before the administrative decisionmaker and takes a position on the claimant's entitlement to benefits.

> The rationale for that extension was that, since the government was formally represented, claimants should not be unrepresented, and in such a setting, government payment for attorneys was appropriate. This rationale does not extend to the hearing process in general, either for initial applicants or for the beneficiaries appealing termination of benefits, because the process itself is not adversarial.

Similarly, Senator Heflin, who advocated covering administrative proceedings, also shared this view (131 Cong. Rec. S20350 (daily ed. July 24, 1985)):

> Under the current provisions of the Equal Access to Justice Act, administrative proceedings where the Government is represented by counsel are covered. However, this provides limited coverage, such as the five pilot adversarial projects relating to social security claims implemented by the Secretary of Health and Human Services.

In sum, the legislative history of the 1985 EAJA, like that of the 1980 Act, unambiguously supports the conclusion that the *only* Social Security administrative proceedings covered by EAJA were those in the experimental representation program. Neither remand proceedings nor any other currently extant Social Security administrative proceedings are covered, for the simple reason that the government's position is not represented by counsel or otherwise. There is accordingly no reason for distinguishing the consistent judicial precedent recognizing, under both Acts, that Social Security administrative proceedings are not covered by EAJA.

2. The court of appeals ruling presents a question of substantial importance because it expands the waiver of sovereign immunity in EAJA to include thousands of cases Congress did not intend to cover. Consequently, it

greatly increases the costs to which the government is exposed under the statute, complicates the resolution of fee litigation, and poses a significant risk of multiplying the administrative burdens placed on the Social Security Administration.

When Congress enacted EAJA in 1980, it noted that Social Security Administration cases accounted for 91% of the approximately 230,000 administrative cases concluded in a typical year; it expressly based its cost projections on the assumption that these cases would not be covered by EAJA. H.R. Rep. 96-1418, 96th Cong., 1st Sess. 20, 22 (1980). Even under the limited coverage Congress provided, the vast majority of EAJA applications are filed against HHS, nearly always in cases involving judicial review of the denial of Social Security benefits (Administrative Office of the United States Courts, 1988 Ann. Rep. of the Director 63-64). For example, of the 498 reported EAJA applications filed in FY 1988, 448 were filed against HHS; 41 in the courts of appeals, and 407 in the district courts (*id.* at 65-66). The potential for future liability under the rule espoused by the court below is even greater. In FY 1986, HHS processed 8,979 Social Security cases on remand from judicial review; 6,118 of those cases (68%) ultimately resulted in the payment of benefits (SSA 1988 Ann. Rep. 23 (March. 1988)).[12] This represents a very substantial pool of potential additional EAJA claims.

Perhaps even more troubling, however, is the fact that the opinion below would substantially increase the dif-

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[12] There were 10,317 remands processed in FY 1987, of which 6,984 (68%) resulted in the payment of benefits. Those figures appears to be somewhat higher than the norm, however, since HHS informs us that there were only 4,39 cases processed in the first three quarters of FY 1988, 3,230 (74%) of which resulted in benefit payments; these figures are more in line with the pre FY 1987 figures.

ficulty of administering EAJA. Although the Court has recently reiterated that "a 'request for attorney's fees should not result in a second major litigation' " (*Underwood*, slip op. 10, quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983)), the rule enunciated below would have precisely that effect. If a claimant who prevailed at the agency level on remand may be entitled to EAJA fees for representation not only before the district court, but also in the subsequent agency proceedings, then the district court must determine whether the government's position in both phases of the case was substantially justified. As we have explained, however (see pp. 9-10 supra), the agency takes no position on the remand, and changed circumstances will frequently make it quite inaccurate to assume, as the court below did, that the issues that were the focus of judicial review remain unchanged on the remand. The district court will thus be faced with the unenviable task of defining an agency position when the agency has taken no position through counsel or otherwise, and then deciding whether that phantom "position" was substantially justified. As the Court stated in discussing other EAJA issues in *Underwood*, slip op. 7, this investment of judicial energy will "strangely distort" the process of judicial review.

Alternatively, claimants who have had cases remanded to the agency may well commence two EAJA proceedings: one in the district court for the judicial phase of the proceeding and one at the administrative level for the post-remand phase of the proceeding. If that happens, HHS, rather than the court, will be required to formulate and evaluate the hypothetical agency position. The agency obviously has no extant procedures for making such determinations; nevertheless, unless the decision below is reversed, it will have to attempt to develop such administration procedures in order to process fee requests from the Eleventh Circuit.

Congress never intended EAJA to trigger the volume of administrative fee litigation presaged by the Eleventh Circuit's opinion, or to generate such convoluted and duplicative inquiries into the government's conduct. The decision below therefore warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1988

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-7355

ELMER HUDSON, PLAINTIFF-APPELLANT

v.

SECRETARY OF HEALTH AND HUMAN SERVICES
DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

[Filed March 14, 1988]

Before: JOHNSON and CLARK, Circuit Judges, and DUMBAULD*, Senior District Judge

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JOHNSON, Circuit Judge:

In this case stemming from an award by an Administrative Law Judge (ALJ) of benefits under the Social Security Act, Elmer Hudson appeals from the determination by the United States District Court for the Northern District of Alabama that she is not entitled to attorney fees under the Equal Access to Justice Act, 28 U.S.C.A. § 2412(d). We reverse and remand. We also hold that the award to Hudson on remand should include attorney fees for time spent on the case at the administrative level after remand prusuant to this Court's earlier decision of *Hudson v. Heckler,* 755 F.2d 781 (11th Cir. 1985).

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* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

I.

Hudson filed for Social Security disability benefits in September 1981. She was administratively denied benefits and requested a hearing before an ALJ. Hudson cried almost continually throughout this hearing, and the ALJ ordered a posthearing psychiatric examination by Dr. Anderson. The ALJ invited Hudson to respond to Dr. Anderson's report. Hudson instead chose to undergo additional examination by a psychologist, Dr. Myers, whose report was submitted to the ALJ.

In *Hudson I,* this Court summarized the reports as follows:

> Dr. Anderson noted that appellant's weeping was appropriate to the context of their conversations. He found her intelligence to be low average and her mood mildly to moderately depressed. Dr. Anderson diagnosed appellant as suffering from a mild to moderate dysthymic disorder and a histrionic personality disorder. He found no evidence of neurological impairment. The doctor also noted appellant's complaints of pain. He concluded that her pyschiatric condition would not significantly interfere with her ability to work. He did not, however, consider the possible effect of an interaction between appellant's pain and psychiatric condition.
>
> Dr. [Myers] found that Hudson was moderately to serverely depressed. He observed that appellant suffered from insomnia, fatigue, psychomotor retardation, tearfulness, and anxiety. He concluded that her psychological problems, mild physical disabilities, and pain combined to render her unemployable absent exhaustive rehabilitative efforts.

Hudson I, 755 F.2d at 783.

The ALJ denied Hudson benefits. In making this determination the ALJ found that Hudson had the following impairments: obesity, chronic low back pain (no etiology established), chronic intermittent hypertension, a mild to moderate dysthymic disorder, and a histrionic personality disorder. The ALJ decided that separately none of these impairments was so severe as to render Hudson disabled. The ALJ, however, did not consider whether the combination of Hudson's impairments rendered Hudson disabled.

In addition, the ALJ did not explain why she discounted Dr. Myers' determination and, in particular, why she did not mention Dr. Myers' consideration of Hudson's impairments in combination. The decision stated only that the ALJ had "carefully considered all the testimony given at the hearing and the document's described in the List of Exhibits. . . ."

The ALJ's denial of benefits became the final decision of the Secretary of Health and Human Services when the Appeals Council approved the ALJ's recommendation. On December 13, 1983, the district court affirmed the ALJ's denial of benefits. On March 19, 1985, this Court held that the Secretary had failed to follow her own Social Security regulations that required consideration of Hudson's impairments in combination. 775 F.2d at 785. In addition, this Court held that the ALJ did not set forth her reasons for the weight accorded the evidence considered. *Id.* at 785-86. Consequently, this Court vacated the denial of benefits and remanded for an evaluation of Hudson's impairments in combination and for the ALJ to address Dr. Myers' report.

During Hudson' appeal to this Court in *Hudson I,* Hudson had filed a new application for disability benefits on January 23, 1984. She was denied benefits and requested a hearing before an ALJ to review this denial. The ALJ's decision on February 23, 1985, found Hudson disabled. In

addition the ALJ found "good cause" to reopen, set aside, and revise the prior unfavorable decision of September 30, 1982 (the appeal from which was pending before this Court in *Hudson I*). The ALJ found Hudson disabled since August 30, 1982.

After this Court's decision in *Hudson I,* the district court remanded the case to the Secretary. Upon remand, the Appeals Council noted that the ALJ lacked jurisdiction in the February 23, 1985, decision to reopen the ALJ's September 30, 1982, decision. The Appeals Council remanded for a hearing before an ALJ and instructed the ALJ to make a recommended decision as to whether Hudson was disabled at any time from May 15, 1981, to August 30, 1982.

After an administrative hearing, the ALJ found Hudson met the listing of mental impairments—a listing whose promulgation was required by Congress in the Social Security Disability Benefits Reform Act of 1984. The ALJ recommended that Hudson was disabled since May 15, 1981.[1] The Appeals Council accepted the ALJ's recommendation and determined pursuant to Hudson's September 3, 1981, application that Hudson was disabled since May 15, 1981.

Hudson sought attorney fees pursuant to the Equal Access to Justice Act. The district court denied Hudson's petition for attorney fees. This timely appeal followed.

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[1] The ALJ's decision paragraph initially recommended, because of a typographical error, an onset date of May 15, 1982. Hudson's attorney pointed out the error and the ALJ revised the onset date to May 15, 1981.

II.

A. Any Award at All?

The Equal Access to Justice Act provides in relevant part that:

> a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was *substantially justified* or that special circumstances make an award unjust.

28 U.S.C.A. § 2421(d)(1)(A) (emphasis added).[2]

This Court recently addressed the standards of appellate review:

> The standard for substantial justification is one of reasonableness. The government must show that its case had a reasonable basis both in law and fact. The test is "more than mere reasonableness."
>
> On review, this court must uphold the district court's denial of an allowance of attorney's fees in the absence of an abuse of discretion. This standard of review requires that we give great deference to a district court's findings of fact, but allows for close scrutiny of its rulings on questions of law.
>
> The government bears the burden of showing that its position was substantially justified.

Stratton v. Bowen, 827 F.2d 1447, 1449-50 (11th Cir. 1987) (citations and footnote omitted).

---

[2] This Court recently noted that "Congress made it clear that 'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action was based." *Stratton v. Bowen,* 827 F.2d 1447, 1449 n.2 (11th Cir. 1987).

The district court denied Hudson's petition because it found the Secretary's petition was "substantially justified":

> When the plaintiff filed her second application she submitted new evidence which was relied on by the administrative law judge in making a determination that the plaintiff was disabled. This evidence was not before the first administrative law judge. During the time the plaintiff's first case was on appeal the Social Security Disability Benefits Reform Act of 1984 was passed. On remand the administrative law judge was instructed to apply the new regulations in evaluating the plaintiff's mental impairments.
>
> When only the evidence before the administrative judge on the initial application is considered this court is persuaded that the Secretary has carried his burden of showing his position was substantially justified.

Hudson v. Bowen, No. 83-A-0632-J, slip op. at 4 (N.D.Ala. Apr. 28, 1987). The Secretary argues his position was substantially justified on three grounds.[3] We can not agree.

1. *Failure to Follow Own Regulations*

In *Hudson I,* this Court determined that the Secretary failed to follow her own regulations. Specifically, 20 C.F.R. § 404.1522 provided that "we can combine unrelated impairments to see if together they are severe enough to keep you from doing substantial gainful ac-

[3] The Secretary also points out that the *Hudson I* Court determined that some of the Secretary's positions were valid. *See* 755 F.2d at 784-85. This is without consequence; *all* of the Secretary's positions have to be substantially justified. *See Haitian Refugee Center v. Meese,* 791 F.2d 1489, 1499-1500 (11th Cir. 1986).

tivity. We will consider the combined effects of unrelated impairments only if all are severe and expected to last 12 months."

The Secretary points to a portion of *Hudson I* to argue that the position was substantially justified. In *Hudson I,* this Court observed:

> Appellee [the Secretary] contends that the ALJ must consider the impairments in combination only when each impairment individually is severe. Section 404.1522 is *ambiguous*[.] The first sentence indicates that non-severe impairments will be combined to determine whether together they render an individual disabled. The following sentence contains *ambiguous* language. If the word "all" refers to "unrelated impairments" then the sentence may support appellee's contention that each impairment individually must be severe, *but this would conflict with the preceding sentence.* If "all" is interpreted as modifying "combined effects," there is no conflict since the sentence simply states that an ALJ will consider combined effects in his disability determination only if those effects are severe.
>
> This court has implicitly adopted the latter construction and *has consistently required that impairments be considered in combination even when the impairments considered separately are not severe. See Bowen [v. Heckler,* 748 F.2d 629 (11th Cir.1984)]; *Reeves v. Heckler,* 734 F.2d 519 (11th Cir.1984); *Brenem v. Harris,* 621 F.2d 688 (5th Cir.1980); *Strickland v. Harris,* 615 F.2d 1103 (5th Cir.1980). We continue to do so.

755 F.2d at 785 n. 2 (emphasis added).

The Secretary contends that this Court's recognition of "ambiguous" language indicates that the Secretary's posi-

tion was substantially justified. The Secretary, however, reads *Hudson I*'s language too broadly. The *Hudson I* Court noted that the second sentence was ambiguous by itself, but was not ambiguous in context with the first sentence (especially because of this Court's longstanding requirement of evaluating impairments in combination). Consequently, the Secretary cannot defend his position by relying on *Hudson I.*

The Secretary next contends that the position was substantially justified based upon Congress's subsequent passage of the Social Security Disability Benefits Reform Act of 1984. In the Disability Amendments, Congress expressly required that "the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity [to qualify the claim for disability benefits]." 42 U.S.C.A. § 423(d)(2)(C). The Secretary also points to passages in the legislative history[4] expressing displeasure that impairments were not being considered in combination. The Disability Amendments and their accompanying legislative history, however, do not support the Secretary's argument because this Circuit had long required the Secretary to consider impairments in combination.

The Secretary points out that *McSwain v. Bowen,* 814 F.2d 617, 620 (11th Cir.1987), determined that the Disability Amendments do not apply retroactively and thus the ALJ did not need to consider the combined effects of unrelated impairments. That part of *McSwain,* however, directly contradicts *Hudson I* and the cases cited in foot-

[4] *See* H.R.Conf.Rep. No. 1039, 98th Cong., 2d Sess. 29, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3080, 3087; H.R.Rep. No. 618, 98th Cong., 2d Sess. 14, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3038, 3051-52.

note 2 of *Hudson I.* Consequently, we choose to follow *Hudson I.* We therefore conclude that the Secretary's position based upon failure to follow regulations could not be substantially justified.

2. *Lack of Specificity*

In *Hudson I,* this Court held that the Secretary could not accept an ALJ recommendation when the ALJ failed to articulate, with requisite specificity, the reasons for her decision. The Secretary cannot claim the position was substantially justified when he accepted the conclusory statement that the ALJ had "carefully considered all the testimony given at the hearing and the documents described in the List of Exhibits. . . ."

As recognized in *Hudson I,* this Court has long held that such conclusory statements are unacceptable. *See Cowart v. Schweiker,* 662 F.2d 731, 735 (11th Cir.1981) ("This statement tells us nothing whatsoever—it goes without saying that the ALJ gave the testimony the weight he believed should be accorded to it. What is required is that the ALJ state specifically the weight accorded to each item of evidence and why he reached that decision. In the absence of such a statement, it is impossible for a reviewing court to determine whether the ultimate decision on the merits of the claim is rational and supported by substantial evidence."). We therefore conclude that the Secretary's position based upon the lack of specificity could not be substantially justified.

3. *Intervening Events*

The Secretary argues (and the district court agreed) that the position was substantially justified on the basis of the evidence before the ALJ at the time of the initial application. The Secretary claims that the ALJ eventually

found Hudson disabled because of new evidence and the intervening Disability Amendments which set up new evaluation procedures for persons claiming mental impairment. In other words, the Secretary argues that, if he had followed his regulations and if the ALJ had set forth the reasons for her decision with requisite specificity, as required by *Hudson I,* then Hudson properly would have been denied benefits at the time of her September 1981 application.

We cannot agree with the Secretary's argument. When Hudson first applied for benefits, the Secretary denied her benefits. The Secretary took the position that Hudson's impairments need not be evaluated in combination and that an ALJ recommendation that failed to articulate the reasons for the ALJ's decision with requisite specificity could be accepted. *Hudson I* rejected the Secretary's position and, as demonstrated above, the Secretary's position on those two grounds was not substantially justified. Even assuming that the Secretary has accurately characterized the basis for the ALJ's grant of benefits on remand, we will not permit the Secretary now to claim that the position was substantially justified on a basis that should have been raised on the appeal of *Hudson I.*[5] In addition, the Secretary's argument would force this Court to do what the Secretary should have done in the first place. We could find the Secretary's position substantially justified only by evaluating Hudson's impairments in combination and setting forth reasons for that determination with requisite specificity based upon the evidence before the ALJ at the

[5] Because the Secretary never claimed during *Hudson I* that even if Hudson's impairments had been examined in combination Hudson would not be entitled to benefits, we question whether the Secretary can now claim that this was a "position of the United States" within the EAJA's language.

time of the first denial. We decline to engage in such a determination.

B. Fees for Time Spent on Remand

Having determined that the district court abused its discretion in not awarding attorney fees, we provide some guidance for the district court on remand.[6] Specifically, the parties dispute whether Hudson's award can include attorney fees for work done at the administrative level after *Hudson I*'s remand.[7]

In *Taylor v. Heckler,* 778 F.2d 674, 676 (11th Cir.1985), this Court observed in dicta that Social Security Act "proceedings at the administrative agency level are excluded from [the EAJA's] coverage." Hudson argues that the Supreme Court disavowed *Taylor*'s dicta in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* __ U.S. __, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986). In *Delaware Valley,* the Supreme Court held that a court could award attorney fees for time spent at administrative proceedings to enforce a consent decree. The crux of the Court's decision was that Congress's use of the word "action" in the Clean Air Act's fee-shifting provision did not exhibit congressional intent that the provision apply only to judicial, and not administrative, proceedings. 106 S.Ct. at 3094-96.

[6] Hudson asks that this Court determine the attorney fees award. Because the Secretary contests Hudson's claimed hours and hourly rates, we remand to the district court for consideration of an appropriate fee award.

[7] We note that Hudson can get attorney fees for this appeal. Such a conclusion accords with Congress's clear intent that "fees incurred by a party when a fee award or denial [by an agency] is appealed are recoverable as part of the final fee award." H.R.Rep. No. 120, 99th Cong., 1st Sess. 16-17 (part I), *reprinted in* 1985 U.S.Code Cong. & Admin.News 132, 145.

Delaware Valley is inapposite here. The EAJA clearly differentiates between judicial and administrative proceedings. Section 2412(d)(1)(A) is limited to judicial proceedings. In contrast, 5 U.S.C.A. § 504 governs administrative proceedings. Section 504(a)(1) provides in relevant part that

> [a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

Section 504(b)(1)(C) provides that "adversary adjudication" means "an adjudication . . . in which the position of the United States is represented by counsel or otherwise. . . ."

The Secretary argues that "[d]uring the remand proceedings before the Social Security Administration in this case, the government was not represented by counsel and therefore an adversary adjudication was not conducted." Appellee's Brief at 26. We reject this argument and conclude that attorney fees are permissible for time spent after remand.

Congress had the following purpose when it adopted the EAJA:

> The bill rests on the premise that certain individuals . . . may be deterred from seeking review of . . . unreasonable government action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. The purpose of the bill is to reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees. . . .

H.R.Rep. No. 1418, 96th Cong., 2d Sess. 5-6, *reprinted in* 1980 U.S.Code Cong. & Admin. News 4984, 4984. In addition, "[t]he bill rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy." *Id.* at 10, *reprinted in* 1980 U.S.Code Cong. & Admin.News at 4988.

Congress expressly chose "[t]o exclude administrative proceedings under the Social Security Act." *Id.* at 12, *reprinted in* 1980 U.S.Code Cong. & Admin.News at 4991. Congess sought to narrow the scope of the EAJA to make its costs acceptable. *Id.* at 14, *reprinted in* 1980 U.S.Code Cong. & Admin.News at 4993. In addition, Congress limited administrative proceedings to "adversary adjudications" in which the position of the United States was represented because "[i]t is basic fairness that the United States not be liable in an administrative proceeding in which its interests are not represented." *Id.* at 12, *reprinted in* 1980 U.S.Code Cong. & Admin.News at 4991.

Legislative history developed during Congress's extension on EAJA in 1985 also illuminates congressional intent:

> One issue which needs clarification is what coverage, if any, is allowed under the Equal Access to Justice Act for Social Security Administration hearings at the administrative level. As enacted in 1980, the Act covers "adversary adjudications"—i.e., an adjudication under section 554 of title 5, United States Code "in which the position of the United States is

> *represented by counsel* or otherwise." (Emphasis added) (See section 504(b)(1)(C) of title 5, United States Code). While this language generally excludes Social Security administrative hearings from the Act, Congress made clear in 1980 that "If * * * the agency does take a position at some point in the adjudication, the adjudication would then become adversarial," and thus be subject to the Act.

H.R. Rep. No. 120, 99th Cong., 1st Sess. 10 (part 1) (footnote omitted), *reprinted in* 1985 U.S.Code Cong. & Admin.News 132, 138.[8]

This language indicates that the critical determination is whether the Secretary has staked out a position. We believe that this language applies equally to those cases where the Secretary accepts an ALJ's denial of benefits and then the Secretary proceeds to litigate that position before a district court (and, as here, a court of appeals). The Secretary certainly has taken the position that the claimant is not entitled to benefits. At such a point, the case becomes adversarial and that the Secretary chooses not to have representation on remand does not change our belief that the proceeding has become adversarial.[9]

[8] Of particular relevance is that *all* of the cases cited by this Court in support of its dicta in *Taylor* were decided *before* EAJA's 1985 extension. For example, the Eighth Circuit relied on EAJA's original 1980 legislative history to conclude that a claimant was not entitled to attorney fees for work performed in administrative proceedings after the district court's remand. *Cornella v. Schweiker,* 728 F.2d 978, 988-89 (8th Cir.1984). The 1985 legislative history counsels otherwise.

In addition, the Eighth Circuit in *Cornella* did not examine the following language from EAJA's original 1980 legislative history:

> The conference substitute defines adversary adjudication as an agency adjudication defined under the Administrative Procedures Act where the agency takes a position through representation by counsel or otherwise. It is intended that this definition precludes an award in a situation where an agency, e.g., the Social Security Administration, does not take a position in the adjudication. *If, however, the agency does take a position at some point in the adjudication, the adjudication would then become adversarial.*

H.R.Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23 (emphasis added), *reprinted in* 1980 U.S.Code Cong. & Admin.News 5003, 5012. The emphasized language, quoted with approval in the 1985 legislative history, suggests that the *Cornella* decision may not be good law on the issue presented by this appeal.

[9] Our holding that Hudson is entitled to attorney fees for work done after remand is not inconsistent with the statement in the 1985 legislative history that "[t]he Committee [on the Judiciary] rejected, by a vote of 12 to 19, an amendment offered by Mr. Morrison relating to remands of Social Security Act cases." *Id.* at 6, *reprinted in* 1985 U.S.Code Cong. & Admin. News at 134-35. We have obtained a copy of Representative Morrison's rejected amendment. The rejected amendment would have effected two changes. First, 28 U.S.C.A. § 2412(d)(1)(B) would have read in relevant part (the emphasized language indicates the text of the rejected amendment):

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, *or in the case of a prevailing party described in paragraph (2)(I) of this subsection, within 30 days after the remand is ordered,* submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection. . . .

Second, 28 U.S.C.A. § 2412(d)(2)(I) would have been added:

> (I) "prevailing party" in a civil action includes a party who, pursuant to section 205(g), 221(d), or 1631(c)(3) of the Social Security Act (2 U.S.C. 405(g), 421(d), or 1383(c)(3)), has won an order remanding the cause for further hearing, except in a case re-

Accordingly, REVERSED and REMANDED.

manded pursuant to section 2(d) of the Social Security Disability Benefits Reform Act of 1984.

We read the rejected amendment as a response to those cases holding that a claimant was not a prevailing party within the meaning of EAJA if the claimant had been accorded a remand only (i.e., had not yet been determined eligible for benefits). *See, e.g., Miller v. Schweiker,* 560 F.Supp. 838 (M.D.Ala. 1983). Because Hudson's appeal does not present the issue the rejected amendment sought to address, we adhere to our conclusion that Hudson is entitled to a fee award for work done after remand.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

No. 83-A-0632-J

ELMER HUDSON, PLAINTIFF

v.

OTIS R. BOWEN SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

U.S. DISTRICT COURT N.D. OF ALABAMA C.T. OLIVER, CLERK

[Filed April 28, 1987]

MEMORANDUM OPINION

This matter is before the court on a motion filed by Richard Ebbinghouse, counsel for the plaintiff, asking that attorney's fees be set pursuant to 28 U.S.C. § 2412(d) (Equal Access to Justice Act).

The court has reviewed the entire record, heard oral arguments and reaches the conclusion that the facts in this case do not warrant such an award.

In 1981 Elmer Hudson filed applications for disability insurance benefits and supplemental security income. Ms. Hudson alleged that she had become disabled in May 1981 because of arthritis in her legs and back. These applications were denied administratively and the plaintiff appealed to this court. In an order dated December 12, 1983 this court concluded that the Secretary's decision was sup-

ported by substantial evidence and should be affirmed. This decision was appealed to the Eleventh Circuit Court of Appeals.

Subsequent to the decision of the district court, but prior to filing the appeal, Hudson filed a second application for benefits alleging an onset date of October 1, 1982. A decision on this application was handed down before a decision from the court of appeals on the first applications. On the second application the administrative law judge found that the plaintiff was disabled due to severe depression. The medical evidence of severe depression had not been part of the first application. The second administrative law judge also reopened the first case and determined the onset date to the August 30, 1982.

Approximately one month after benefits were granted, the Eleventh Circuit issued its opinion on the first applications, vacating the decision of the district court and instructing the court to remand the case for further proceedings.

Ultimately another hearing was conducted for the purpose of taking additional evidence on the nature and severity of the plaintiff's psychiatric impairment from the date of onset alleged in the initial complaint to the onset date established by the administrative law judge on the second application. It was eventually determined that the plaintiff had been disabled since May 15, 1981.

The only issue before the court now is whether the plaintiff is entitled to have her attorney's fees paid pursuant to 28 U.S.C. § 2412(d) (EAJA).

The Equal Access to Justice Act provides, in part, that:

> [A] court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

The Equal Access to Justice Act sets forth two requirements for an award of attorney's fees: first, the court must find that the claimant was a "prevailing party"; second, the court must determine whether the positions of the United States was "substantially justified" or any "special circumstances" would make an award of fees unjust.

While the Secretary expresses some doubt as to whether or not this plaintiff is truely a prevailing plaintiff, he argues more fervently that his position in denying Ms. Hudson's benefits was substantially justified.

The standard for substantial justification is one of reasonableness. The government has the burden of showing its position has a reasonable basis in both law and fact. *White* v. *United States,* 740 F.2d 836 (11th Cir. 1984); *Matthews* v. *United States,* 713 F.2d 677 (11th Cir. 1983). Substantial justification involves both the litigation position and the position of the government. 28 U.S.C. § 2412(d)(2)(D). The fact that the plaintiff was ultimately awarded benefits does not raise a presumption that the government's position was not substantially justified. See, *White* v. *United States,* 790 F.2d 836 (11th Cir. 1984).

When the plaintiff filed her second application she submitted new evidence which was relied on by the administrative law judge in making a determination that the plaintiff was disabled. This evidence was not before the first administrative law judge. During the time the plaintiff's first case was on appeal the Social Security Disability

Benefits Reform Act of 1984 was passed. On remand the administrative law judge was instructed to apply the new regulations in evaluating the plaintiff's mental impairments.

When only the evidence before the administrative judge on the initial application is considered this court is persuaded that the Secretary has carried his burden of showing his position was substantially justified.

On the basis of the foregoing reasons, the plaintiff's petition for attorney's fees pursuant to 28 U.S.C. § 2412(d) (Equal Access to Justice Act) is hereby denied.

An appropriate order in conformity with this memorandum opinion will be entered.

This the 28th day of April, 1987.

/s/ C. W. ALLGOOD
Senior United States
District Judge

APPENDIX C

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

In the case of	Claim for
Elmer Hudson	Period of Disability, Disability Insurance Benefits and Supplemental Security Income
(Claimant)	
	419-56-3075
(Wage Earner) (Leave blank if same as above)	(Social Security Number)

The United States District Court of Appeals for the 11th Circuit, and the United States District Court for the Northern District of Alabama, remanded this case (Civil Action Number 83-A-0632-J), to the Secretary of Health and Human Services for further administrative action. Therefore, the Appeals Council remanded the case to an Administrative Law Judge.

On June 25, 1986 and July 23, 1986, the Administrative Law Judge issued recommended decisions and advised the claimant and counsel that any exception, objection, or comment concerning the recommended decision should be filed with the Appeals Council within twenty (20) days. None has been received.

In its review of the Administrative Law Judge's recommended decision of June 25, 1986, amended on July 23,

1986, the Appeals Council notes that although the evidence and testimony of the medical advisor show that during the period May 15, 1981 to August 30, 1982, the claimant equallied Listing 12.04, and although the Administrative Law Judge so ruled, the Psychiatric Review Technique Form attached to the recommended decision shows that the claimant met Listing 12.04. Therefore, the Appeals Council has completed the attached Psychiatric Review Technique Form showing that during the period May 15, 1981 to August 30, 1982, the claimant equalled Listing 12.04.

The Appeals Council also notes that the claimant filed concurrent Title II and Title XVI claims on January 23, 1984 (Exhibits B-2 and B-8). The evidence submitted with those claims shows that the claimant's emotional problems did not remain static or improve; rather it deteriorated to the point where she met Listing 12.04 as was found by an Administrative Law Judge in his decision of February 23, 1985. Accordingly, the Appeals Council finds that during the period May 15, 1981 to August 30, 1982, the claimant's emotional impairment equalled Listing 12.04. Since August 30, 1982, the claimant's emotional impairment has met Listing 12.04. Accordingly, the Appeals Council finds that the claimant's disability commenced on May 15, 1981, and continues through the date of this decision.

The Appeals Council's remand order of December 14, 1985, referred to the Title II claim of September 31, 1981 (Exhibit 1) only, and omitted reference to the Title XVI claim also filed on September 3, 1981 (Exhibit 5), which had been before the court. The Administrative Law Judge ruled only on the Title II claim. There is no evidence that the claimant has dropped the Title XVI claim. Therefore, the Appeals Council hereby reinstate the Title XVI claim of September 3, 1981. As the medical criteria

for a finding of disability under Titles II and XVI are the same, the Appeals Council finds that all reference to the finding of a period of disability under Title II also apply to the Title XVI claim.

The Appeals Council adopts the recommended decisions of June 25, 1986 and July 23, 1986, as herein modified, and holds that, based on the application filed on September 3, 1981, the claimant is entitled to a period of disability commencing on May 15, 1981, and to disability insurance benefits under the provisions of section 216(i) and 223, respectively, of the Social Security Act, as amended.

It is the further decision of the Appeals Council that, based on the application filed on September 3, 1981, the claimant has been disabled under section 1614(a)(3) of the Social Security Act.

The component of the Social Security Administration responsible for authorizing supplemental security income payments will advise the claimant regarding the non-disability requirements and, if eligible, the amount and the month(s) for which payment will be made.

APPEALS COUNCIL

_____

_____

Date: October 22, 1986

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

RECOMMENDED DECISION

In the case of Elmer Hudson	Claim for Period of Disability and Disability Insurance Benefits
(Claimant)	
	419-56-3075
	(Social Security Number)

This case is before the Administrative Law Judge upon Order of Remand of the United States District Court for the Northern District of Alabama.

ISSUES

The general issue before the Administrative Law Judge is whether the claimant is entitled to a period of disability and to disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act, as amended. The specific issues are whether the claimant is under a "disability" as defined in the Act, as amended, and if so, when such "disability" commenced and the duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement.

APPLICABLE PROVISIONS OF LAW

Section 216(i) of the Social Security Act (42 U.S.C. 416 (i)) provides for the establishment of a period of disability

and Section 223 (42 U.S.C. 423) of the Act provides for the payment of disability insurance benefits where the requirements specified therein are met.

Section 223(d)(1) of the Act, as pertinent herein, defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months."

Section 223(d)(2)(A) of the Act provides, as pertinent herein, that an individual shall be determined to be under a disability only if his physical or mental impairment (or impairments) are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. Work which exists "in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

Section 223(d)(3) of the Act provides: "For purposes of this subsection, a 'physical or mental impairment' is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

Section 223(d)(5) of the Social Security Act, as amended, provides than an individual shall not be considered to be under a disability unless he furnishes such medical or other evidence of the existence thereof as the Secretary may require.

Pursuant to the authority of the Social Security Act, the Secretary of Health and Human Services has promulgated Regulations No. 4 of the Social Security Administration which is codified as part 404 of Title 20 of the Code of Federal Regulations (20 CFR 404.1 et seq.).

Section 404.1508 of Regulations No. 4 (20 CFR 404.1508), as pertinent, herein, provides that if you are not working, your physical and mental impairments will be considered first in determining whether you are disabled. Your impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques and must be established not only by your statement of symptoms, but also by medical evidence consisting of signs, symptoms, and laboratory findings.

Section 404.1520(d) of Regulations No. 4 (20 CFR 404.1520(d)), as pertinent herein, provides that if you have an impairment which meets the duration requirement and is listed in Appendix 1 to Subpart P, or is determined to be equal to one of the listed impairments, you will be determined to be disabled without consideration of the vocational factors.

EVIDENCE CONSIDERED

The undersigned has carefully considered all the testimony given at the hearing and the documents described in the List of Exhibits attached to this decision.

EVALUATION OF THE EVIDENCE

This case is before the undersigned on Order of the Appeals Council remanding the case to the Administrative Law Judge pursuant to remands from the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Northern District of

Alabama. This case concerns an application for disability insurance benefits filed by the claimant on September 3, 1981, in which the claimant alleged disability from May 15, 1981, due to "arthritis in legs and back." The sole issue in this case is whether the claimant was disabled from May 15, 1981, the claimant's alleged onset date, to August 30, 1982.

The medical evidence of record documents that the claimant has been diagnosed as having borderline intellectual functioning, clinical depression, anxiety, obesity, chronic low back pain, and chronic remittent hypertension. In order to ascertain whether the claimant was disabled from May 15, 1981, to August 30, 1982, the undersigned requested that Charles E. Herlihy, M.D., a medical advisor and psychiatrist, testify at the hearing. Dr. Herlihy testified that from May 15, 1981, to August 31, 1982, the claimant's mental impairments equaled the criteria of Section 12.04 of the Listing of Impairments, pertaining to affective disorders.

After carefully considering the record and Dr. Herlihy's testimony, the undersigned recommends that the claimant be found disabled from May 15, 1981, to August 30, 1982, on the basis that her condition equals the criteria of Section 12.04 of the Listing of Impairments.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act on May 15, 1981, the date the claimant stated she became unable to work, and continues to meet them through the date of this decision.

2. The claimant has not engaged in substantial gainful activity since May 14, 1981.

3. The medical evidence establishes that the claimant has severe borderline intellectual functioning and depression.

4. The severity of the claimant's impairments equals the requirements of Section 12.04, Appendix 1, Subpart P, Regulations No. 4 and has precluded her from working for at least 12 continuous months (20 CFR 404.1526).

5. The claimant was under a "disability, as defined in the Social Security Act, beginning May 15, 1981, and extending to August 30, 1982 (20 CFR 404.1520(d)).

RECOMMENDED DECISION

It is the recommended decision of the Administrative Law Judge that, based on the application filed on September 3, 1981, the claimant is entitled to a period of disability commencing May 15, 1982 and to disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act and that the claimant's disability extended through August 30, 1982.

/s/ SAMUEL A. MONTGOMERY
Administrative Law Judge
Room 420, West Oxmoor Tower
11 West Oxmoor Road
Birmingham, AL 35209

Date: June 25, 1986

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

REVISED DECISION

In the case of Elmer Hudson	Claim for Period of Disability and Disability Insurance Benefits
(Claimant)	
	419-56-3075 (Social Security Number)

On June 25, 1986, the undersigned issued a recommended decision finding the claimant was under a "disability," as defined in the Social Security Act, beginning May 15, 1981, and extending to August 30, 1982. Erroneously, the decision paragraph cites the date of onset of disability as May 15, 1982. Therefore, the decision paragraph is hereby amended to reflect that it is the recommended decision of the Administrative Law Judge that, based on the application filed on September 3, 1981, the claimant is entitled to a period of disability commencing May 15, 1981, and to disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act and that the claimant's disability extended through August 30, 1982.

/s/ SAMUEL A. MONTGOMERY
Administrative Law Judge
Room 420, West Oxmoor Tower
11 West Oxmoor Road
Birmingham, AL 35209

Date: July 23, 1986

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

**ORDER OF APPEALS COUNCIL
REMANDING COURT CASE TO AN
ADMINISTRATIVE LAW JUDGE**

In the case of Elmer Hudson	Claim for Period of Disability and Disability Insurance Benefits
(Claimant)	
	419-56-3075
(Wage Earner) (Leave blank if same as above)	(Social Security Number)

The United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Northern District of Alabama have remanded this case to the Secretary of Health and Human Services for further administrative action. Therefore, the Appeals Council vacates its denial of the claimant's request for review and the decision of the Administrative Law Judge issued on September 30, 1982 and remands this case to an administrative law judge for further proceedings consistent with the order of the court.

The Appeals Council notes that the claimant filed new applications for disability insurance benefits and supplemental security income on January 23, 1984. In a decision issued on February 23, 1985, an Administrative Law Judge reopened the hearing decision of September 30, 1982 and found that, based on her applications filed on

September 3, 1981, the claimant was entitled to a period of disability beginning on August 30, 1982 and to disability insurance benefits and that she had been disabled under Title XVI of the Social Security Act since August 30, 1982. (The Appeals Council notes that the Administrative Law Judge did not have jurisdiction to reopen the hearing decision of September 30, 1982 because of the pending civil action and that he should have issued a recommended decision.)

The period now at issue extends from May 1981, the month in which the claimant stated she became unable to work, to August 30, 1982.

Upon remand, the Administrative Law Judge shall provide the claimant an opportunity to testify at a supplemental bearing and to submit additional evidence. He may wish to obtain the testimony of a medical advisor as to the nature and severity of the claimant's psychiatric impairment during the remaining period at issue.

Section 5 of the Social Security Disability Benefits Reform Act of 1984 (Public Law 98-460) required the Secretary to publish revised regulations for determining disability due to mental disorders. The revised regulations were published in the *Federal Register* (Vol. 50, No. 167) on August 28, 1985. The Administrative Law Judge shall apply these regulations in evaluating any mental impairment the claimant may have.

The Administrative Law Judge may take any further action necessary to complete the administrative record. Upon completion of all proceedings, the Administrative Law Judge shall issued a recommended decision with a completed Psychiatric Review Technique form.

The claimant and attorney will be given the opportunity to file with the Appeals Council, within 20 days from the date of notice of the recommended decision, briefs or

other written statements of exceptions and comments as to the applicable facts and law. After the 20-day period has expired, the Appeals Council will review the record and issue its decision.

APPEALS COUNCIL

/s/ ANDREW S. WAKSHUL
ANDREW E. WAKSHUL, MEMBER

/s/ VERRELL L. DETHLOFF, JR.
VERRELL L. DETHLOFF, JR., MEMBER

Date: December 14, 1985

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

419-56-3075
Civil Action No. 83-A-0632-J

ELMER HUDSON, PLAINTIFF

v.

MARGARET M. HECKLER SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

[Filed July 24, 1985]

ORDER

The Eleventh Circuit Court of Appeals, on March 19, 1985, vacated the order of the district court affirming the decision of the Secretary that the plaintiff is not disabled and instructed the court to remand the case to the Secretary. The Court of Appeals found the Secretary had failed to follow her own regulations in failing to consider whether the combination of impairments rendered the plaintiff disabled. The Secretary also failed to explain the weight accorded each of the physician's reports.

For the above reasons, it is ORDERED that this case be, and the same hereby is, REMANDED to the Secretary for further consideration.

DONE, this the 23rd day of July, 1985.

/s/ C. W. ALLGOOD
Senior United States
District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 84-7098

ELMER HUDSON, PLAINTIFF-APPELLANT

v.

MARGARET M. HECKLER SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

March 19, 1985

Before: GODBOLD Chief Judge, ANDERSON, Circuit Judge, and THORNBERRY*, Senior Curciut Judge.

PER CURIAM:

The Secretary denied disability insurance and SSI benefits to a 44 year-old woman who is obese and suffers from chronic low back pain, chronic intermittent hypertension, a mild to moderate dysthymic disorder, and a histrionic personality disorder. The district court found substantial evidence to support the Secretary's decision and affirmed. Because the Secretary failed to follow her own regulations, we vacate and remand for further consideration under proper legal standards.

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* Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

FACTS

Appellant Elmer Hudson completed the ninth grade and has been employed as a janitor and a domestic worker. She last worked in May 1981. Appellant filed for disability benefits in September 1981.

The medical evidence shows that Hudson was examined by Dr. Featheringill, an orthopedic specialist, in October 1981. He noted obesity and some limitation in appellant's movement but could not determine the etiology for her back pain. Appellant was subsequently examined by Dr. Mosley who made a diagnosis similar to that of Dr. Featheringill. He found some tenderness in Hudson's lower back but no apparent limitation in her movement and no obvious etiology for her pain, although he believed that appellant's complaints were sincere. Dr. Mosley also found that Hudson suffered from chronic intermittent hypertension. In addition the doctor completed a physical capabilities evaluation questionnaire and concluded that appellant had some mild restrictions on her physical capabilities.

Appellant's application for benefits was denied initially and on reconsideration. She requested and received a hearing before an administrative law judge, where she was represented by a paralegal provided by the Legal Services Corporation of Alabama. At the hearing appellant testified that she suffered from back pain, depression, and nervousness. She cried throughout the hearing. Dr. Steward, a vocational expert, also testified. He stated that, based upon Dr. Mosley's evaluation, appellant could perform domestic work. He also testified, however, that appellant would not be employable if her continuous crying had a medical basis.

The ALJ ordered a post-hearing psychiatric examination by Dr. Anderson. The ALJ notified appellant's

representative of the examination and invited a response to Dr. Anderson's report. Appellant's representative chose instead to have her undergo an additional examination by a psychologist, Dr. Meyers. His report was submitted to the ALJ.

Dr. Anderson noted that appellant's weeping was appropriate to the context of their conversations. He found her intelligence to be low average and her mood mildly to moderately depressed. Dr. Anderson diagnosed appellant as suffering from a mild to moderate dysthymic disorder and a histrionic personality disorder. He found no evidence of neurological impairment. The doctor also noted appellant's complaints of pain. He concluded that her psychiatric condition would not significantly interfere with her ability to work. He did not, however, consider the possible effect of an interaction between appellant's pain and psychiatric condition.

Dr. Meyers found that Hudson was moderately to severely depressed. He observed that appellant suffered from insomnia, fatigue, psychomotor retardation, tearfulness, and anxiety. He concluded that her psychological problems, mild physical disabilities, and pain combined to render her unemployable absent exhaustive rehabilitative efforts.

After the submission of these two post-hearing evaluations, the ALJ rendered her decision and found that appellant was not disabled because she could perform work similar to that which she had done in the past.

DISCUSSION

Several of appellant's contentions are without merit. The evidence submitted by appellant's treating physician, Dr. Scarborough, received all the consideration it was due. Dr. Scarborough saw appellant twice and submitted only

sketchy, conclusory notes. The opinion of a "treating physician may be rejected when it is so brief and conclusory that it lacks persuasive weight or when it is unsubstantiated by any clinical or laboratory findings." *Bloodsworth v. Heckler,* 703 F.2d 1233, 1240 (11th Cir. 1983).

The ALJ's finding that appellant's pain was not disabling was not based on an improper use of objective evidence. The ALJ did not ignore appellant's subjective complaints of pain; she simply found them not credible to prove disabling pain. This credibility determination was for the Secretary, not the courts. *Bloodsworth v. Heckler, supra.* Moreover, the ALJ did not require objective proof that appellant was in pain. She instead properly inquired whether there was an underlying impairment or a cause of the pain that was medically determinable. *See Wiggins v. Schweiker,* 679 F.2d 1387 (11th Cir.1982).

Finally, the failure of appellant's representative to cross-examine Dr. Anderson did not render appellant's hearing "fundamentally unfair." Due process is violated when a claimant is denied the opportunity to subpoena and cross-examine those who submit medical reports. *See Richardson v. Perales,* 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); *Cowart v. Schweiker,* 662 F.2d 731 (11th Cir.1981); *Lonzollo v. Weinberger,* 534 F.2d 712 (7th Cir.1976). Appellant had the opportunity to cross-examine Dr. Anderson but chose to waive her right.

Appellant insists that there was no waiver of the right to cross-examine because the ALJ did not tell appellant's representative—a paralegal—that her client had such a right. Moreover, appellant argues, the ALJ may have unintentionally misled the paralegal when she wrote her informing her that she could respond to Dr. Anderson's psychiatric evaluation. Since cross-examining the doctor

was not included among the suggested methods of response, appellant's representative might have assumed that cross-examination was not an available option. Under these circumstances, concludes appellant, the court should not find that the right to cross-examine Dr. Anderson was waived.

The cases cited by appellant as support for her position that the ALJ had a duty to instruct appellant's representative as to her right to cross-examine are inapposite here. They involve situations where claimants had no legal representation. The courts consistently recognize their special responsibility toward these claimants. *See, e.g., Cowart v. Schweiker, supra* (ALJ's basic obligation to develop full and fair record rises to level of "special duty" when unrepresented claimant unfamiliar with hearing procedures appears before him). Furthermore, cases relied upon for appellant's suggestion that a letter not expressly listing cross-examination as a method of responding to a post-hearing evaluation indicates no waiver also involve unrepresented claimants. *See, e.g., Lonzollo v. Weinberger, supra.* Again these decisions reflect the court's awareness that the failure to exercise a right does not necessarily imply a knowing waiver when the actor is an individual who probably does not suspect that he possesses such a right. *Cf. Richardson v. Perales, supra* (Court found waiver where claimant represented by attorney simply did not avail himself of opportunity to cross-examine).

While a paralegal may not possess all the legal expertise of an attorney,[1] we are unprepared in this case to treat

[1] We do not hold that we recognize no differences in skill and expertise between a paralegal and an attorney. We simply find that those differences do not justify a "special duty," not owed attorneys, to in-

a paralegal like unrepresented and often unsophisticated claimants completely unfamiliar with the law or with agency practice. Paralegals by definition have some legal training and experience. Those employed by organizations that represent the indigent and that provide representation for claimants before agencies acquire some knowledge of administrative practice.

We find, therefore, that the ALJ had no duty to inform appellant's paralegal representative of her client's right to cross-examine Dr. Anderson. The representative's failure to cross-examine constituted a waiver of the right, and thus no due process violation occurred.

Appellant does correctly contend, however, that the Secretary did not follow her own regulations. In making her disability determination the ALJ found that appellant had the following impairments: obesity, chronic low back pain (no etiology established), chronic intermittent hypertension, a mild to moderate dysthymic disorder, and a histrionic personality disorder. The ALJ decided that separately none of these impairments was so severe as to render appellant disabled. The ALJ, however, did not consider whether the combination of appellant's impairments rendered her disabled. Where a "claimant has alleged a multitude of impairments, a claim . . . may lie even though none of the impairments, considered individually, is disabling." *Bowen v. Heckler,* 748 F.2d 629, 635 (11th Cir.1984). The ALJ, therefore, has a duty to consider the impairments in combination. *See* 20 C.F.R. § 404.1522 (1984).[2] Failure to do so requires that the case be

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form appellant's paralegal representative in this case of the right to cross-examine.

[2] Appellee contends that the ALJ must consider the impairments in combination only when each impairment individually is severe. Section 404.1522 is ambiguous:

vacated and remanded for the proper consideration.[3] *See, e.g., Reeves V. Heckler,* 734 F.2d 519 (11th Cir.1984); *Wiggins v. Schweiker, supra, Strickland v. Harris,* 615 F.2d 1103 (5th Cir.1980).

> [W]e can combine unrelated impairments to see if together they are severe enough to keep you from doing substantial gainful activity. We will consider the combined effects of unrelated impairments only if all are several and expected to last 12 months.

The first sentence indicates that non-severe impairments will be combined to determine whether together they render an individual disabled. The following sentence contains ambiguous language. If the word "all" refers to "unrelated impairments" then the sentence may support appellee's contention that each impairment individually must be severe, but this would conflict with the preceding sentence. If "all" is interpreted as modifying "combined effects," there is no conflict since the sentence simply states than an ALJ will consider combined effects in his disability determination only if those effects are severe.

This court has implicitly adopted the latter construction and has consistently required that impairments be considered in combination even when the impairments considered separately are not severe. *See Bowen, supra; Reeves v. Heckler,* 734 F.2d 519 (11th Cir. 1984); *Brenem v. Harris,* 621 F.2d 688 (5th Cir. 1980); *Strickland v. Harris,* 615 F.2d 1103 (5th Cir.1980). We continue to do so.

[3] Contrary to appellant's position, remand is not warranted under Section Five of the Reform Act which places a moratorium on mental health reviews. The relevant part provides that:

> (c)(1) Any initial determination that an individual is not under a disability by reason of a mental impairment and any determination that an individual is not under a disability by reason of a mental impairment in a reconsideration of or hearing on an initial disability determination, made or held under title II or XVI of the Social Security Act after the date of the enactment of this Act and prior to the date on which revised criteria are established by regulation in accordance with subsection (a), and any determination that an individual is not under a disability by reason of a mental impairment made under or in accordance with title II or XVI of such Act in a reconsideration of, hearing on, review by the Appeals Council of, or judicial review of a decision rendered

The decision rendered by the ALJ also does not make clear the weight accorded the evidence considered. The ALJ, for example, does not explain why she obviously discounts Dr. Meyer's evaluation, and in particular, why she omits from her decision any mention of his consideration of appellant's impairments in combination. The decision only states that the ALJ has "carefully considered all the testimony given at the hearing and the documents described in the List of Exhibits. . . ." As we have noted before:

> [t]his statement tell us nothing whatsoever—it goes without saying that the ALJ gave the testimony the weight he believed should be accorded to it. What is required is that the ALJ state specifically the weight accorded to each item of evidence and why he reached that decision. In the absence of such a statement, it is impossible for a reviewing court to determine whether the ultimate decision on the merits of the claim is rational and supported by substantial evidence.

Cowart v. Schweiker, 662 F.2d at 735; *see also Wiggins v. Schweiker, supra.* On reconsideration the ALJ should articulate the reasons for her decision with the requisite specificity.

VACATED and REMANDED with instructions to remand to the Secretary.

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in any continuing eligibility review to which subsection (bv)(1) applies, shall be redetermined by the Secretary as soon as feasible after the date on which such criteria are so established, applying such revised criteria.

Appellant's initial determination and reconsideration occurred prior to October, 1984, the date of the enactment of the Act.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

No. 83-A-0632-J

ELMER HUDSON, PLAINTIFF

v.

MARGARET M. HECKLER SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

[Filed December 13, 1983]

MEMORANDUM OPINION

The plaintiff, Elmer Hudson, brings this action pursuant to the provisions of Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), seeking judicial review of a final adverse decision by the Secretary of Health and Human Services. Applications for the establishment of a period of disability, under Section 216(i) of the Act, 42 U.S.C. § 416(i), and for disability insurance benefits, under Section 223 of the Act, 42 U.S.C. § 423, were filed on September 9, 1981. Additionally, an application for supplemental security income, under Title XVI of the Act, was filed on September 9, 1981. The applications were denied administratively and that position was sustained on reconsideration by the Social Security Administration. On

March 12, 1982, the plaintiff requested a hearing and on September 30, 1982 an administrative law judge found that she was not entitled to disability insurance benefits. This position was approved by the Appeals Council, thus becoming the final decision of the Secretary for purposes of appeal to the district court. The case is now properly before this court.

The scope of judicial review in disability cases is narrow and limited to determining whether the decision of the Secretary is supported by substantial evidence. *Richardson* v. *Perales,* 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 2d 842 (1971); *Western* v. *Harris,* 633 F.2d 1204 (5th Cir. 1981). The court has reviewed the entire record and after a careful consideration of the plaintiff's contentions, is of the opinion that the decision of the Secretary is supported by substantial evidence. Accordingly, the decision of the Secretary must be and the same hereby is affirmed. An appropriate order in conformity with this opinion will be entered.

This the 12th day of December, 1983.

/s/ C. W. ALLGOOD
Senior United States
District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7355
D.C. Docket No. 83-0632

ELMER HUDSON, PLAINTIFF-APPELLANT

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA

[Filed March 14, 1988]

Before: JOHNSON AND CLARK, Circuit Judges, and
DUMBALD*, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is

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* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

hereby, REVERSED; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: March 14, 1988
For the Court: Miguel J. Cortez, Clerk

By: KAREN MCNAVB
Deputy Clerk

ISSUED AS MANDATE: JUNE 1, 1988

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7355

ELMER HUDSON, PLAINTIFF-APPELLANT

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA

[Filed May 24, 1988]

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion March 14, 1988, 11 Cir., 198__, __F.2d__).

Before: JOHNSON AND CLARK, Circuit Judges, and DUMBAULD*, Senior District Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Ap-

* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

pellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ FRANK M. JOHNSON, JR.
United States Circuit Judge

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—241 699/60699

OPPOSITION

BRIEF

(2)

No. 88-616

In the Supreme Court of the United States

October Term 1988

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

V.

ELMER HUDSON, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

Richard J. Ebbinghouse
Gordon, Silberman, Wiggins
& Childs, P.C.
15th Floor Colonial Bank Building
Birmingham, Alabama 35203
(205) 328-0640
Counsel for Respondent

81 pp

QUESTIONS PRESENTED

1. Does a civil action lose its status as a civil action under the Equal Access to Justice Act when it is remanded by a court to the Secretary and the district court still has jurisdiction over the civil action?

2. Is there an exception to all civil actions being subject to the Equal Access to Justice Act when the clear language of the statute does not provide for such an exception and finding one would be inconsistent with the legislative history of the statute?

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No. 88-616

In the Supreme Court of the United States

October Term 1988

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

V.

ELMER HUDSON, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

COURSE OF THE PROCEEDINGS

A. STATEMENT OF THE CASE

Mrs. Elmer Hudson filed for Social Security disability benefits on September 3, 1981. She was administratively denied benefits and filed for review of her claim in the United States District Court on March 18, 1983. R. 1. On December 13, 1983, the District Court affirmed the Secretary of Health and Human Services (hereinafter "the Secretary") denial of benefits. R. 9. She appealed to the Eleventh Circuit. R. 11. The Eleventh Circuit entered an order vacating the opinion of the District Court and remanded the case with instructions to the Secretary of Health

and Human Services. R. 13. *Hudson v. Heckler*, 755 F.2d 781 (11th Cir. 1985).

Mrs. Hudson on January 23, 1984, filed a new application for disability benefits. She was denied benefits and requested a hearing before an Administrative Law Judge (hereinafter "A.L.J."). During the pendency of her appeal to the Eleventh Circuit, the A.L.J. hearing Mrs. Hudson's appeal of the denial of her January 23, 1984 application, found her disabled. R. 14. The A.L.J.'s decision was rendered on February 23, 1985. R. 14. The A.L.J. in his opinion found an onset date of disability of August 30, 1982. The Eleventh Circuit's decision of March 19, 1985, vacating and remanding with instructions issued as mandate on April 11, 1985. R. 13.

Plaintiff moved for summary judgment based upon the decision of the A.L.J. R. 14. Plaintiff also moved for the award of attorney's fees and filed discovery. R. 15, 16. Defendant opposed the motion for summary judgment, attorney's fees and filed a motion for a protective order from discovery filed by the Plaintiff. R. 19, 18, 17.

The district court entered an order remanding the case to the Secretary. R. 21. Plaintiff renewed her petition for attorney's fees based upon the favorable decision of the Appeals Council. The district court denied the petition for attorney's fees. R. 36, 37. Plaintiff filed a timely appeal on May 22, 1987. R. 38. The Eleventh Circuit reversed the district court. Petitioner filed a petition for a writ of certiorari.

B. STATEMENT OF THE FACTS

Mrs. Elmer Hudson applied for Social Security disability benefits on September 3, 1981. She was administratively denied benefits and requested a hearing before an A.L.J. She had listed on her application for benefits that she had arthritis in her legs and back. H.R. 55.[1] In her request for reconsideration she had referred to the problem with her back as a back ailment. H.R. 61. Though Mrs. Hudson had completed the ninth grade, I.Q. tests administered to her showed her to be at the borderline range of mental retardation and normal with scores falling at the lower end of normal. H.R. 34, 121. She had worked all of her life as a maid or janitorial worker. H.R. 33. During her first administrative hearing, Mrs. Hudson cried almost continually throughout the hearing. H.R. 37, 44-46. The A.L.J. ordered a post hearing consultative examination by a psychiatrist. H.R. 51. A psychologist also evaluated her. H.R. 120. The A.L.J. found that Mrs. Hudson had the impairments of obesity, chronic low back pain, chronic intermittent hypertension, a mild to moderate dysthymic disorder, and a histrionic personality disorder, but denied Mrs. Hudson benefits. H.R. 18. The district court affirmed the Secretary, finding substantial evidence to support the Secretary's decision. R. 8, 9.

Mrs. Hudson on February 10, 1984, filed an appeal to the Eleventh Circuit. R. 11. The Eleventh Circuit's March 19, 1985, opinion vacated the decision and remanded with instructions to the Secretary. *Hudson v. Heckler*, 755 F.2d 781 (11thCir. 1985), R. 13. The Eleventh Circuit found that the Secretary had failed to follow her own regulations. *Id.* at 783, 785.

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1 Hearing record (hereinafter referred to throughout this brief as "H.R.") refers to the hearing record from the first administrative hearing of Ms. Hudson. It is located within the record in the brown file folder that is tied shut with string and is bound with a brown cover. H.R. _ refers to the page number therein.

The Social Security regulations require that the combination of impairments must be considered to determine whether someone is disabled. The Eleventh Circuit also held that the decision of the A.L.J. did not set forth the reasons for the weight accorded the evidence considered. *Hudson v. Heckler*, 755 F.2d at 785. The case was remanded with instructions that the combination of impairments be considered and that the A.L.J. state the reasons for the weight accorded to the evidence.

At no time during the proceedings did the United States concede that the case should have been remanded for further proceedings for consideration of the combination of impairments nor that the A.L.J. needed to make clear the weight accorded the evidence. The United States steadfastly contended throughout the appeals of this case in both the district court and the Eleventh Circuit that the Plaintiff was not entitled to receive disability benefits.

During the pendency of her first appeal to the Eleventh Circuit, Mrs. Hudson on January 23, 1984, filed a new application for disability benefits. She was denied benefits and requested a hearing before an A.L.J. to review the denial of her January 23, 1984, application. R. 14. The A.L.J. rendered a decision on February 23, 1985, finding Mrs. Hudson disabled. R. 14. The A.L.J. found "good cause" for reopening, setting aside and revising the prior unfavorable decision dated September 30, 1982, and found Mrs. Hudson disabled since August 30, 1982. R. 14.

Mrs. Hudson moved for summary judgment in the district court after the Eleventh Circuit vacated and remanded with instructions based upon the decision of the A.L.J. R. 14. The Secretary opposed the motion for summary judgment, contending that a factual issue existed concerning the fifteen month period covered by Mrs. Hudson's original application and the onset date found by the A.L.J. in the February 23, 1985, decision.

R. 19. "The Secretary submits that in this action, such period must be considered in light of the evidence contained in the record." R. 19-4. Mrs. Hudson also moved for the award of attorney's fees and filed discovery. R. 15. 16. The Secretary opposed both the petition for attorney's fees under the Equal Access to Justice Act (hereinafter "EAJA") and filed a motion for a protective order from discovery. R. 17, 18.

The district court entered an order noting that the Eleventh Circuit had vacated its order affirming the decision of the Secretary, because the Secretary had failed to follow her own regulations in failing to consider whether the combination of impairments make the Plaintiff disabled. R. 21. The district court also stated that the Secretary also failed to explain the weight accorded each of the physician's reports. R. 21. The district court for those reasons remanded the case to the Secretary for further consideration. R. 21.

The Appeals Council after the remand noted that the A.L.J. in his February 23, 1985, decision did not have jurisdiction to reopen the hearing decision of September 30, 1982. R. Exhibit B, Appendix. The Appeals Council remanded the case for a hearing before an A.L.J. The A.L.J. was to make a recommended decision concerning disability for the time period May 15, 1981 to August 30, 1982. The A.L.J. was to apply the revised regulations for determining disability due to mental disorders which the Social Security Disability Benefits Reform Act of 1984 required the Secretary to publish. R. Exhibit B, Appendix.

An administrative hearing was held and the A.L.J. in his June 25, 1986, recommended decision found Mrs. Hudson to meet the listing of mental impairments. R. Exhibit B, Appendix. The recommended decision, however, erroneously found an onset date of disability to commence May 15, 1982. R. Exhibit B.

Plaintiff's counsel brought this to the attention of the A.L.J. App. *infra* at 4a n. 1. The A.L.J. revised his recommended decision to recommend the onset date of disability began on May 15, 1981. App. *infra* at 29a. The Appeals Council accepted the recommendations of the A.L.J.'s recommended decision and found Mrs. Hudson disabled based upon her application filed on September 3, 1981 commencing on May 15, 1981. R. Exhibit E, Appendix.

Mrs. Hudson filed renewed and amended petitions for attorney's fees. R. 22, 23, 28. She petitioned for attorney's fees for work done both in representing her on appeal in the district court and Eleventh Circuit and for work performed on the case after the remand of *Hudson I*.[2] The district court denied the petition for attorney's fees. R. 37. Plaintiff appealed the district court's decision. R. 38. The Eleventh Circuit reversed holding the Mrs. Hudson should be awarded attorney's fees. The court also found that she was entitled to be recover fees under E.A.J.A. for work done on the case after it was remanded. Petitioner's petition for a writ of certiorari seeks review of the portion of the Eleventh Circuit decision that fees may be awarded under E.A.J.A. when a case is remanded by court order after the Secretary has taken a position that a claimant is not entitled to social security benefits. Respondent contends that the petitioner's petition is due to be denied.

SUMMARY OF ARGUMENT

1. E.A.J.A. coverage applies to civil actions brought against the United States. The United States was a party to a civil action in the Social Security case. The fact that the case was remanded by the court did not end the court action. Remand orders to the

2 As used throughout this response *Hudson I* refers to the first decision of the Eleventh Circuit, *Hudson v. Heckler*, 755 F.2d 781 (11th Cir. 1985).

Secretary are interlocutory orders, not final judgments. *E.g., Taylor v. Heckler,* 778 F.2d 647 (11th Cir. 1985); *Howell v. Schweiker*, 669 F.2d 524 (11th Cir. 1983). The remand proceedings are a part of the civil action, because the action did not end. E.A.J.A. provides for attorney fees for services performed in connection with civil actions. E.A.J.A. applies to remand proceedings pursuant to a court order.

2. This case is not the "typical" social security case. It is factually distinguishable. The typical case is resolved by a hearing before an A.L.J. Here while on appeal at the Eleventh Circuit, an A.L.J. overturned Mrs. Hudson's denial of benefits by reopening her case. Later on remand, the Appeals held the A.L.J. did not have jurisdiction to reopen the case and the issue whether Mrs. Hudson was disabled would be considered again. The Secretary could also choose not to follow the recommendation of the A.L.J. The Secretary by staking out a position on appeal that Mrs. Hudson was not disabled put at risk all of Mrs. Hudson's benefits. The proceedings under these circumstances were adversarial. Additionally after receiving a favorable recommendation the A.L.J., Mrs. Hudson through her attorney had to correct an error in the A.L.J.'s recommendation that would have cost her a years worth of benefits. Fees are recoverable to protect a favorable judgment. Fees were available under these circumstances to Mrs. Hudson.

3. Fees for work on remand is a narrow area within E.A.J.A. It does not cover the "typical" social security case. Only cases won on appeal and remanded by the court are within E.A.J.A. coverage. With the narrow definition of substantial justification that is applied by the courts, the number of cases capable of being awarded E.A.J.A. fees for work on remand is limited.

I. REASONS OPPOSING THE WRIT

Petitioner fails to address the heart of the Court of Appeals decision regarding fees from work done on remand. There is a fundamental legal distinction between a case which is litigated in court and subsequently remanded for further proceedings and a typical administrative hearing before an A.L.J. Second, there is a significant factual distinction in Mrs. Hudson's case from that of the typical social security administrative hearing which decides for the first time whether the claimant is entitled to benefits. Third, the assumption of the petitioner that the award of attorney's fees for a case such as this will result in opening the floodgates is also fundamentally flawed. Each of these are examined below.

II. E.A.J.A. APPLIES TO ATTORNEY FEES INCURRED BY THE RESPONDENT BECAUSE THE REMAND WAS A PART OF THE CIVIL ACTION

E.A.J.A. coverage applies to work performed in civil actions. 28 U.S.C. § 2412(d)(1)(A). Fees are awarded under E.A.J.A. when the applicant for fees is a prevailing party and government fails to carry its burden of proving substantial justification. Once a civil action has begun, E.A.J.A. coverage applies. E.A.J.A. provides in relevant part that:

> a Court shall award to a prevailing party other than the United States fees and other expenses ... incurred by that party **in any civil action** ... brought by or against the United States in any court having jurisdiction of that action. *Id.* (emphasis supplied).

Congress intended that the United States should be liable when it is a named party and represented in a civil action under the Social Security Act. U.S. Code Congressional & Adm. News, 96th Cong. 2d Sess. House Report No. 96-1418, p. 4991.

The fact that a case is remanded by a court does not end the civil action. Remand orders to the Secretary are interlocutory orders, not final judgments. E.g., *Taylor v. Heckler*, 778 F.2d 674 (11th Cir. 1985); *Howell v. Schweiker*, 699 F.2d 524 (11th Cir. 1983), citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978). The remand proceedings are a part of the proceedings of the civil action. The court still has jurisdiction of the case and any action taken on remand is subject to further review of the court. *Id.* All time Mrs. Hudson seeks to be compensated for has arisen while the court action was pending and pursuant to the court's order. Remand to the Secretary for further proceedings **was a part of the court proceedings.**

Petitioner completely overlooks that the remand did not end the civil action in the court. The statute is absolutely clear that fees are awarded for work performed in civil actions. 28 U.S.C. § 2412(d)(1)(A). Statutory rules of construction provide that when the statutory language is clear, the statute is followed. E.g. *Blum v. Stenson*, 465 U.S. 866, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984). Even if the legislative history is consulted, the 1985 legislative history *does not* unmistakably evidence a congressional intent to prohibit the award of fees in this type of situation as petitioner contends. The petitioner misunderstood the import of what the Court of Appeals was stating in its opinion.

The intent for E.A.J.A. to apply to adversary adjudications was made clear in the 1980 legislative history when Congress first passed E.A.J.A. H.R. Cong. Rep. No. 1434, 96th Cong. 2d Sess.

23, reprinted in 1980 Code and Administrative News 5003, 5012. The legislative history to the passage of E.A.J.A. clearly shows that where the Secretary stakes out a position that the proceeding is adversarial for which fees may be awarded.

> The conference substitute defines adversary adjudication as an agency adjudication defined under the Administrative Procedures Act when the agency takes a position through representation by counsel or otherwise. It is intended that this definition precludes an award in a situation where an agency, e.g., the Social Security Administration, does not take a position in the adjudication. **If, however, the agency does take a position at some point in the adjudication, the adjudication would then become adversarial.** U.S. Code Congressional & Adm. News, 96th Cong. 2d Sess. House Conf. Report No. 96-1434, p. 5012 (emphasis added).

The Court of Appeals did not misapply the language of the legislative history, contrary to the petitioner's assertion. The Court of Appeals found that if that standard that was applied in an administrative hearing context, it certainly was the standard to be applied to this case when was still pending in court.[3]

This language indicates that the critical determination is whether the Secretary has staked out a position. We believe that

3 Though the Court of Appeals opinion may not have been as explicit on this point is it could have been, this point was clearly made at oral argument. The Court of Appeals was more than familiar with its own opinion of Taylor v. Heckler, supra see App. *infra* at 11a, 14a n. 8., concerning the finality of judgment in a social security case when it noted the dicta in that opinion in deciding the instant case.

this language applies equally to those cases where the Secretary accepts an ALJ's denial of benefits and then the Secretary proceeds to litigate that position before a district court (and, as here, a court of appeals). *Hudson II* at 15a.

The Court of Appeals reasoned that if Congress clearly indicated that if E.A.J.A. applies when the Secretary stakes out a position in an adversary adjudication, it also applies when the Secretary litigates that position in the district court. This is completely consistent with the legislative history to the 1980 passage of E.A.J.A. U.S. Code Congressional & Adm. News, 96th Cong. 2d Sess. House Report No. 96-1418, p. 4991. A remand to the Secretary does not end the civil action, but rather is a part of it. The district court still has jurisdiction over the proceedings and the civil action is still pending. *Taylor v. Heckler, supra; Howell v. Schweiker, supra.* 28 U.S.C. § 2412(d)(1)(A). The proceedings held pursuant to the district court's order of remanding this case before the Secretary for further consideration were part of the "civil action" and thus compensable. 28 U.S.C. § 2412(d)(1)(A).

The hearing before the Secretary which was mandatory as a result of the district court's order was necessary to advance successful litigation. Under these circumstances fees should be awarded. *Cf., New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54, 100 S.Ct. 54, 64 L.Ed.2d 723 (1980)(fees available under Title VII for mandatory administrative proceedings pursuant to the Title VII); *Webb v. Board of Education of Dyer County, Tenn.*, 471 U.S. 234, 105 S.Ct.1923, 85 L.Ed.2d 233 (1985)(administrative work useful and ordinarily necessary to advance civil rights litigation compensable in a § 1983 action).[4]

4 Furthermore, as addressed *infra* at 18, fees for work done to recover fees may be awarded under E.A.J.A.

What the Court of Appeals makes clear is that the Secretary did stake out a position in this case. App. infra, 15a. As noted by the Court of Appeals, even in Social Security cases, where the Secretary stakes out a position the general rule that E.A.J.A. does not apply to Social Security cases is inapplicable. The proceedings under such circumstances would be subject to E.A.J.A. H. R. Rep. No. 120, 99th Cong., 1st Sess. 10 (part 1), *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 138. "While, generally, Social Security administrative hearings remain outside the scope of the statute, those in which the Secretary is represented are covered by the Act." *Id.*[5]

None of the cases cited by the petitioner for the proposition that E.A.J.A. fees cannot be awarded for work performed in proceedings on remand consider whether there was still a pending court action nor the legislative history to the original 1980 enactment[6] or the 1985 extension of the Act.[7] The clear language of the statute provides that the court shall award fees incurred for work in any civil action 28 U.S.C. § 2412(d)(1)(A). The Secretary in the factual circumstances of this case was still represented by counsel in the court proceeding that was pending when the hearing pursuant to the remand order of the court was held. Afterward the results of the remand must be filed with the Court. 42 U.S.C.§ 405(g) (1982); *Brown v. Secretary of Health and Human Services*, 747 F.2d 878, 882 (3rd Cir. 1987). Petitioner completely ignores this in its petition.

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5 See *infra* at 19.

6 H.R. Cong. Rep. No. 1434, 96th Cong. 2d Sess. 23, *reprinted in* 1980 U.S. Code Cong. & Adm. News 5003, 5012.

7 H.R. Rep. No. 120, 99th Cong, 1st Sess., 10 (part 1) *reprinted in* 1985 U.S. Code Cong. & Admin. News, 132, 138.

III. MRS. HUDSON'S CASE IS FACTUALLY NOT THE TYPICAL CASE CONGRESS CONTEMPLATED IN LIMITING E.A.J.A. FEES

There is a fundamental distinction between the typical social security case and the instant case.[8] The facts in Mrs. Hudson's case highlight this fundamental distinction between a case heard before an A.L.J. before any appeal to the district court and one where the Secretary has staked out a position. First, the typical social security case goes through the administrative hearing process with a hearing before an A.L.J. The proceedings at that stage are clearly not covered by the Equal Access to Justice Act ("E.A.J.A."). The proceedings at that stage are not adversarial and Congress had no intent to provide for representation at that stage. U.S. Code Congressional & Adm. News, 96th Cong. 2d Sess. House Report No. 96-1418, p. 4991. A denial of benefits

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8 Besides the factual differences between Mrs. Hudson's case and the "typical" social security case which are relevant in consideration of the Petitioner's petition, the "typical" social security disability case also does not last seven years. The purpose of E.A.J.A. was to alleviate economic deterrents to contesting unreasonable government action by shifting the burden from the private litigant to the government when the government's position is substantially unjustified. *E.g., Watford v. Heckler*, 765 F.2d 1562, 1566 (11th Cir. 1985). It must not be forgotten that when the government is a defendant that the Plaintiff is the only attorney general. *Martin v. Heckler*, 773 F.2d 1145, 1150 (11th Cir. 1985). For a disabled person seeking to enforce her rights to receive disability the daily problem is acquiring the cash flow needed to meet the expenses for which disability benefits are intended. Their income is inadequate to pay for counsel when an appeal is necessary to the district court or court of appeals to vindicate their claim for benefits. The timely receipt of attorneys fees and receipt of adequate fees is essential to attract skilled counsel to represent them. Without being awarded adequate E.A.J.A. fees the amount of time required to properly represent claimants on appeals in the courts, especially when there has been continual criticism about the lack of proper preparation of cases by attorneys in present times, would go uncompensated. Twenty five

by the A.L.J. may be appealed through the administrative process House Report No. 96-1418, p. 4991. A denial of benefits may be appealed through the administative process and then appealed to the district court. The next appeal then lies with a court of appeals. Note that throughout this process, one may not have a decision overruled by a lower tribunal or review process while on appeal. That, however, was not the situation in the instant

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footnote 8 (continued)

percent of the accrued benefits normally is insufficient to compensate the time required to spend on appellate work. Without adequate compensation from E.A.J.A. awards claimants will be unable to obtain representation. Twenty-five percent of the accrued benefits that were awarded in Mrs. Hudson's case covered the time period of May 15, 1981, to August 30, 1982 amounting to $604.47. Counsel prior to this petitioner's petition had expended a total of 292.89 hours on this case for $2.06 per hour expended to date. The rate of compensation is obviously not competitive with the market rate for legal work. Equally important, timely receipt of payment for services rendered is essential to obtain adequate representation. Cash flow is important to the success of any law office, especially when counsel was a solo practioner. *Martin v. Heckler*, 773 at 1151. This case unfortunately has been a second major litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

The Secretary at every step of the proceedings has denied that fees should be paid. Counsel has personally experienced that salaried government attorneys consistently seek to avoid E.A.J.A. liability. *Panola Land Buying Association v. Clark*, 844 F.2d 1506 (11th Cir. 1988). The pool of attorneys willing to take cases against the government is diminishing. *Compare Evans v. Jeff D.*, 106 S.Ct. 1531, 1545 n.34 (1986) *with* 106 S.Ct. 1552-53, *Panola, supra*. Opposition to payment of legitimate fees has become the standard operating procedure of the government as demonstrated by the reported cases. *Id.; National Senior Citizens Law Center v. Social Security Administration*, 849 F.2d 401 (9th Cir. 1988). Unless adequate and timely fees are paid for work in these types of cases which are lengthy and strenuously contested, claimants such as Mrs. Hudson will not be able to secure representation because their cases do not compensate for necessary work, while "typical" cases that do not require court appeals do so.

case. Mrs. Hudson on January 23, 1984, filed a new application for disability benefits. The A.L.J. reviewing the denial of her January 23, 1984, application rendered a decision on February 23, 1985, finding Mrs. Hudson disabled. R. 14. The A.L.J. found "good cause" for reopening, setting aside and revising the prior unfavorable decision dated September 30, 1982, and found Mrs. Hudson disabled since August 30, 1982. R. 14. During the appeal of *Hudson I* the Secretary took the position that the Secretary's decision was supported by substantial evidence, and that Mrs. Hudson had failed to carry her burden of proof. Appellee's Brief to *Hudson I* at 21.

Subsequent to that decision, the court of appeals remanded the decision to the Secretary from Mrs. Hudson's first hearing. The Appeals Council after the remand from the Court of Appeals noted that the A.L.J. in his February 23, 1985, decision did not have jurisdiction to reopen the hearing decision of September 30, 1982. R. Exhibit B, Appendix. The Appeals Council remanded the case for a hearing before an A.L.J. The A.L.J. was to make a recommended decision concerning disability for the time period May 15, 1981 to August 30, 1982. Despite the lack of jurisdiction to reopen the hearing decision, as a result of the hearing decision of February 23, 1985 Mrs. Hudson was receiving benefits.

The Secretary on remand from the Eleventh Circuit had opposed summary judgment claiming there was still a factual issue whether Mrs. Hudson was disabled from May 15, 1981, up to August 30, 1982. R. 19.[9] Then, the Appeals Council held the award of benefits beginning on August 30, 1982, was merely advisory and that the A.L.J. did not have jurisdiction to award

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9 "Moreover, there is absolutely no indication that such remand will ultimately result in the award of any benefits different than what the Secretary has already awarded." R. 18, p. 9.

benefits to her for any date before her re-application. R. Exhibit B, Appendix. The Secretary could choose not to follow the recommended decision of the A.L.J. and Mrs. Hudson could have lost the benefits that she was receiving as a result of the A.L.J.'s February 25, 1985, decision. *Scott v. Bowen*, 808 F.2d 1428 (11th Cir. 1987).

On remand the hearing held before the A.L.J. in his first recommended decision, the A.L.J. recommended on onset date of disability of May 15, 1982. R. Exhibit C. Counsel for Mrs. Hudson brought it to the attention of the A.L.J. to correct his recommendation to reflect properly the true onset date of disability as May 15, 1981. App., *infra* at 4a n.1. Not having legal representation at that stage would have meant that Mrs. Hudson would have been denied one year of benefits that she was entitled to receive. Not having representation could also have meant that Mrs. Hudson could have lost the right to receive benefits if she had not been successful at the hearing after the case was remanded. This is anything but the "typical" social security disability case. Mrs. Hudson's rights had to be protected by ensuring that her disability claim was properly considered under the regulations. If she lost at the administrative level, she would have had a hollow victory from winning at the Eleventh Circuit.

On the appeal of *Hudson I* the Secretary staked out a position. In this case the Secretary denied that Mrs. Hudson was disabled within the meaning of the disability act. Appellee's Brief to *Hudson I* at 21. On remand to the Secretary to conduct another hearing, the civil action was still pending and subject to further review. *Taylor v. Heckler, supra.*[10] Neither the statute nor the

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10 See discussion at *8-13 supra.*

legislative history state that once the civil action is filed which is obviously adversarial that the case ceases to be adversarial for purposes of the statute. Here, Mrs. Hudson by the position taken by the Secretary had everything at stake, even the award of benefits she had previously been awarded by the Secretary through the A.L.J. decision of February 23, 1985. This was not the situation of simply a hearing before an A.L.J. after a denial of a request for reconsideration nor that of a hearing before an A.L.J. where the Secretary on appeal conceded that the case should be remanded to the Secretary for further proceedings. This was not the situation that Congress contemplated when stating that fees were not available in E.A.J.A. cases involving social security cases at the administrative level. Here, the Secretary at the court of appeals had taken the position through counsel.

The Secretary had taken a position against Mrs. Hudson on appeal that

> having considered all the evidence of record found that Ms. Hudson was not entitled to the benefits claimed ... submits that her decision is supported by substantial evidence and that decision of the District Court should be affirmed. Appellee's brief in *Hudson I* at 28.

The Secretary had the power to reject any recommendation of the A.L.J. to award benefits. *Scott v. Bowen*, 808 F.2d 1428 (11th Cir. 1987). Having the power and having taken a position against the claimant, the issue is not whether the Secretary took adverse action to continue to influence the proceedings, but rather did the Secretary have the power to do so after having staked out a position adverse to the claimant. Clearly, the Secretary had

such power. Petitioner also argues that nothing in the post remand proceedings lend the slightest support to the view that the Secretary's adversarial position in the district court continued to influence the proceedings on remand. Respondent simply cannot concede that point and it is unfair for this court to consider it. First, counsel for Mrs. Hudson did have to point out an error in the first recommended decision of the A.L.J. which the A.L.J. corrected. Absent counsel to call this significant error to the attention of the A.L.J., Mrs. Hudson would have lost one year of back benefits. App., *infra*, 4a N.1. Whether the Secretary "continued to influence" or not the error would have certainly been in favor of the Secretary. Second, when discovery was previously sought in this case, the Petitioner sought a protective order. Subsequently, in the district court in opposing respondent's fee petition, petitioner claimed that the 1985 legislative history emphasized that there should be not discovery in connection with E.A.J.A. applications. Defendant's Supplemental Opposition to Plaintiff's Application For Attorney's Fees at 33. Respondent never was able in the district court to obtain the information to prove or disprove the petitioner's statement. Third, having skilled counsel to protect a claimant's rights in such a situation protects the integrity of the proceedings. *Cf., Marshall v. United Steelworkers of America, Inc.* 666 F.2d 845 (3rd Cir. 1981). Since under this system there can be no motion filed to recuse the Secretary as can be done in a court proceeding, the only way to maintain the integrity of the system is to provide people with the means to challenge unreasonable government conduct. U.S. Code Congressional & Adm. News, 96th Cong. 2d Sess. House Report No. 96-1418, p. 4991.

Mrs. Hudson faced the real possibility of losing the benefits that she was receiving. She also faced the possibility that if denied the onset date found at the earlier administrative hearing while *Hudson I* was on appeal she would have an overpayment

which potentially would have to be paid back to the Secretary. She needed counsel and was entitled to protect her social security award. Under such circumstances fees should be paid. *Cf., Johnson v. State of Mississippi*, 606 F.2d 635, 639 (5th Cir. 1979). The Secretary overlooks the interest that Mrs. Hudson had in protecting her award. No hearing pursuant to a court order could hardly be more adversarial from her perspective. Mrs. Hudson had more of a reason for representation under these circumstances. She also had an interest in the is critical to a claimant which relates directly to making it possible to secure counsel. She also needed to be able to compensate him.

The purpose of E.A.J.A. is to provide that persons have a means to challenge unreasonable government conduct. U.S. Code Congressional & Adm. News, 96th Cong. 2d Sess. House Report No. 96-1418, p. 4991. The first criteria for being eligible for an award of attorney's fees is that one must be a prevailing party. A remand of a social security case will not necessarily entitle a claimant to an award of attorney's fees under E.A.J.A. *E.g., Brown v. Secretary of Health and Human Services,* 747 F.2d 878 (3rd Cir. 1984); *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980). It is quite possible for a claimant to win a remand, but be denied benefits and thus fail to met the requirements of being a prevailing party. *Id.*

Though the petitioner states that this Court has made it clear that an administrative agency has no power to deviate from the mandate issued, frequently there is deviation from the mandate. As an example, the mandate of the Eleventh Circuit was that the Secretary had to consider the claimants' combination of impairments. The Secretary, however, did not consider the combination of impairments. While the Secretary admittedly considered new evidence on remand which was to the claimant's benefit, the Secretary without ever complying with the Court of Appeals'

mandate argued in opposition to attorney's fees. The Secretary maintained that because new evidence was considered on remand, E.A.J.A. fees should not be awarded for work performed in Mrs. Hudson's case. Defendant's Supplemental Opposition to Plaintiff's Application for Attorney's Fees Pursuant to EAJA, March 30, 1987 at 6, 8 n.2, 9. To protect her position with respect to a claim for attorney's fees as a prevailing party, Mrs. Hudson needed counsel present to assist her in securing benefits so she could protect her position with respect to being a "prevailing party" within the meaning of E.A.J.A. The issue is what is work done on recovering fees? The Secretary on remand could ignore a recommendation made by the A.L.J., thus affecting Mrs. Hudson's status as a prevailing party. *Scott v. Bowen*, *supra.* Fees have been allowed for work spent in protecting fee awards on appeal. *E.g., Johnson v. State of Mississippi,* 606 F.2d 635 (5th Cir. 1979). Fees also may be awarded for work done on recovering fees. *E.g. Trichilo v. Secretary of Health and Human Services*, 823 F.2d 702 (2nd Cir. 1987); *Johnson v. State of Mississippi*, 606 F.2d 636 (5th Cir. 1979). Here, work was performed in protecting Mrs. Hudson's position regarding fees as a "prevailing party" in the civil action proceeding during the remand ordered by the district court. Severing parts of the litigation is inappropriate when the congressional mandate is to make challenge of unreasonable government conduct possible. U.S.Code and Congressional and Adm. News, 96th Cong. 2d Sess. House Report No. 96-1418, p. 4991. To hold that one cannot receive attorneys fees to protect their claim when the Secretary can otherwise control if they are eligible by denying them "prevailing party" status would seriously undermine E.A.J.A.

In a similar context this Court has held in *Pennsylvania v. Delaware Valley Citizens Council*, 106 S.Ct. 3088 (1986), where there is a connected court action and work performed at the administrative level to protect the rights obtained in that action,

attorney's fees for that work can be awarded. *Id.* Though not directly applicable to E.A.J.A., the situation is analogous enough to be instructive. There, an "action" under the Clean Air Act included time spent to protect the judgment obtained. The same should be held here with respect to the civil action when the district court on a remand to the Secretary has not issued a final order in the case.

Assuming *arguendo* that the proceedings on remand are considered administrative, nothing in the legislative history indicates that once the Secretary has taken a position at some point in the adjudication, the proceeding somehow converts back to not being adversarial when the very issues that gave rise to it being adversarial are still at issue. In the court proceedings the Secretary, represented by counsel, staked out a position. U.S. Code Congressional & Adm. News, 96th Cong. 2d Sess. House Conf. Report No. 96-1434, p. 5012. The legislative history of the 1985 reenactment does not indicate that the Secretary's experimental program at the time was the only situation where the proceedings would be subject to E.A.J.A., but rather that such a situation is the type where the Secretary is represent which are covered by E.A.J.A. H.R. Rep. No. 120, 99th Cong, 1st Sess., 10 (part 1 *reprinted in* 1985 U.S. Code Cong. & Admin. News, 132, 138-39. As noted by the Court of Appeals it was the Secretary's choice not to be represented at the hearing. That the Secretary chose to revoke the experimental representation program cannot be persuasive authority. First, to do so would allow the Secretary to determine when liability may be imposed under E.A.J.A. and frustrate Congress' intent to empower people to challenge unreasonable government action. Second, the experimental project was directed toward initial administrative hearings of eligibility, not cases after appeal on remand pursuant to a court order. Nothing legally prevented the Secretary being present when the hearing was part of a legal proceeding.

IV. FEES FOR WORK ON REMAND IS A NARROW AREA WITHIN E.A.J.A.

The Secretary incorrectly argues that the Court of Appeals ruling expands E.A.J.A. to thousand of cases Congress did not intend to cover. Congress intended under E.A.J.A. to cover civil actions. It did not intend to cover under E.A.J.A. "typical" administrative hearings.

> [T]he Committee has eliminated non-adversary adjudications (including administrative proceedings under the Social Security Act) from the coverage of the principal part of this bill.
>
> ...
>
> It is intended that this definition precludes an award in a situation where an agency, e.g., the Social Security Administration, does not take a position in the adjudication. U.S. Code Congressional & Adm. News, 96th Cong. 2d Sess. House Conf. Report No. 96-1434, p. 4999, 5012.

The Court of Appeals' decision does not affect the vast majority of Social Security cases. The typical initial hearings before A.L.J.'s are not covered under the Act. Remand of proceedings where the Secretary requests or acquiesces to a remand are not covered under E.A.J.A., because the proceedings are not adversarial. No position in the proceedings has been taken against the claimant or staked out by the Secretary.

The only cases that fall within the narrow class of cases which provide the possibility of consideration for E.A.J.A. coverage are cases which are won on appeal and remanded. The fact that the case is reversed does not mean that thousands of cases are now eligible to have E.A.J.A. fees awarded. To qualify for E.A.J.A. the claimant must become a prevailing party. Winning a remand does not automatically confer prevailing party status on the claimant. *E.g., Brown v. Secretary of Health and Human Services*, 747 F.2d 878 (3rd Cir. 1984); *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980).

When a court vacates an administrative decision and remands the matter for reconsideration, the successful party generally should not recover attorney's fees at that particular time since the claimant's rights and liabilities and those of the government have not yet been determined. *Brown, supra* at 883 (citation omitted).

Second, this Count's recent interpretation under E.A.J.A. of substantially justified as the narrower definition of "justified to a degree that could satisfy a reasonable person" instead of more than mere reasonableness limits the number of cases that meet that standard. *Underwood v. Pierce*, 105 S.Ct. 2541 (1988). To qualify for fees upon a remand from a court proceeding first, the claimant must be a prevailing party on their social security benefits claim and second, the government's position must not be substantially justified.

Contrary to the Secretary's assertion, there would be no difficulty in administering E.A.J.A. The majority of cases would not have E.A.J.A. fees awarded, because the government would be substantially justified.[11] The amount of fees historically awarded have been dramatically less than the amount that had been predicted by the Congressional Office and the Justice

Department. H.R. Rep. No. 120, 99th Cong, 1st Sess., 10 (part 1) *reprinted in* 1985 U.S. Code Cong. & Admin. News, 132, 137.

The Secretary's argument that there will be difficulty in administering the award of fees is not substantiated. Previously, the Secretary has represented to the courts "that should a claimant receive benefits upon remand, the case must still return to the district court for a final judgment." *Brown v. Secretary of Health* and *Human Services, supra* at 882. The Secretary argument that determination of fees will become difficult on whether the government was substantially justified is without merit. The courts have already confronted this issue in the context of the agency's underlying position and its litigation position. Those courts which have addressed the issue have had not trouble in resolving the issue and awarding fees. *Trichilo v. Secretary of Health and Human Services*, 823 F. 2d 702, 708 (2nd Cir. 1987); *Russell v. Heckler*, 814 F.2d 148, 155 (3rd Cir. 1987); *Cinciarelli v. Reagan*, 729 F.2d 801, 810 (D.C.Cir. 1981).

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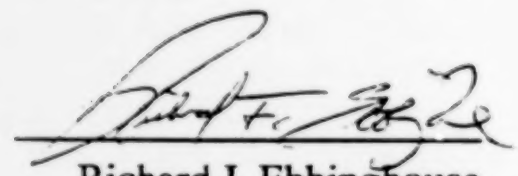
11 If the Secretary is implicitly stating that in the vast number of cases that the Secretary was not substantially justified, then no excuse exists for not awarding fees.

CONCLUSION

Remand proceedings pursuant to a court order does not end the civil action. E.A.J.A. applies to all civil actions. A remand is not a final order of the court. E.A.J.A. applies to the proceedings held pursuant to the court's order. The was not a "typical" social security case. Mrs. Hudson had at stake benefits that she had been awarded by a previous A.L.J. The Secretary had taken an adversarial position against Mrs. Hudson on appeal. The proceedings were compensable under those circumstances. Fees for work on remand after winning on appeal is a narrow area within E.A.J.A. No exception denying E.A.J.A. coverage should be applicable to the of this case. Under these circumstances, Petitioner's petition is due to be denied.

Respectfully submitted,



Richard J. Ebbinghouse

Attorney for Respondent

Certificate of Service

This is to certify that I have served the foregoing by United States first class mail, postage prepaid and properly addressed to all attorney's of record on this 14th day of November, 1988.

Richard J. Ebbinghouse

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-7355

ELMER HUDSON, PLAINTIFF-APPELLANT

v.

SECRETARY OF HEALTH AND HUMAN SERVICES
DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

[Filed March 14, 1988]

Before: JOHNSON and CLARK, Circuit Judges, and DUMBAULD*, Senior District Judge

---

JOHNSON, Circuit Judge:

In this case stemming from an award by an Administrative Law Judge (ALJ) of benefits under the Social Security Act, Elmer Hudson appeals from the determination by the United States District Court for the Northern District of Alabama that she is not entitled to attorney fees under the Equal Access to Justice Act, 28 U.S.C.A. § 2412(d). We reverse and remand. We also hold that the award to Hudson on remand should include attorney fees for time spent on the case at the administrative level after remand prusuant to this Court's earlier decision of *Hudson v. Heckler*, 755 F.2d 781 (11th Cir. 1985).

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* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

I.

Hudson filed for Social Security disability benefits in September 1981. She was administratively denied benefits and requested a hearing before an ALJ. Hudson cried almost continually throughout this hearing, and the ALJ ordered a posthearing psychiatric examination by Dr. Anderson. The ALJ invited Hudson to respond to Dr. Anderson's report. Hudson instead chose to undergo additional examination by a psychologist, Dr. Myers, whose report was submitted to the ALJ.

In *Hudson I,* this Court summarized the reports as follows:

> Dr. Anderson noted that appellant's weeping was appropriate to the context of their conversations. He found her intelligence to be low average and her mood mildly to moderately depressed. Dr. Anderson diagnosed appellant as suffering from a mild to moderate dysthymic disorder and a histrionic personality disorder. He found no evidence of neurological impairment. The doctor also noted appellant's complaints of pain. He concluded that her pyschiatric condition would not significantly interfere with her ability to work. He did not, however, consider the possible effect of an interaction between appellant's pain and psychiatric condition.
>
> Dr. [Myers] found that Hudson was moderately to serverely depressed. He observed that appellant suffered from insomnia, fatigue, psychomotor retardation, tearfulness, and anxiety. He concluded that her psychological problems, mild physical disabilities, and pain combined to render her unemployable absent exhaustive rehabilitative efforts.

Hudson I, 755 F.2d at 783.

The ALJ denied Hudson benefits. In making this determination the ALJ found that Hudson had the following impairments: obesity, chronic low back pain (no etiology established), chronic intermittent hypertension, a mild to moderate dysthymic disorder, and a histrionic personality disorder. The ALJ decided that separately none of these impairments was so severe as to render Hudson disabled. The ALJ, however, did not consider whether the combination of Hudson's impairments rendered Hudson disabled.

In addition, the ALJ did not explain why she discounted Dr. Myers' determination and, in particular, why she did not mention Dr. Myers' consideration of Hudson's impairments in combination. The decision stated only that the ALJ had "carefully considered all the testimony given at the hearing and the document's described in the List of Exhibits. . . ."

The ALJ's denial of benefits became the final decision of the Secretary of Health and Human Services when the Appeals Council approved the ALJ's recommendation. On December 13, 1983, the district court affirmed the ALJ's denial of benefits. On March 19, 1985, this Court held that the Secretary had failed to follow her own Social Security regulations that required consideration of Hudson's impairments in combination. 775 F.2d at 785. In addition, this Court held that the ALJ did not set forth her reasons for the weight accorded the evidence considered. *Id.* at 785-86. Consequently, this Court vacated the denial of benefits and remanded for an evaluation of Hudson's impairments in combination and for the ALJ to address Dr. Myers' report.

During Hudson' appeal to this Court in *Hudson I,* Hudson had filed a new application for disability benefits on January 23, 1984. She was denied benefits and requested a hearing before an ALJ to review this denial. The ALJ's decision on February 23, 1985, found Hudson disabled. In

addition the ALJ found "good cause" to reopen, set aside, and revise the prior unfavorable decision of September 30, 1982 (the appeal from which was pending before this Court in *Hudson I*). The ALJ found Hudson disabled since August 30, 1982.

After this Court's decision in *Hudson I*, the district court remanded the case to the Secretary. Upon remand, the Appeals Council noted that the ALJ lacked jurisdiction in the February 23, 1985, decision to reopen the ALJ's September 30, 1982, decision. The Appeals Council remanded for a hearing before an ALJ and instructed the ALJ to make a recommended decision as to whether Hudson was disabled at any time from May 15, 1981, to August 30, 1982.

After an administrative hearing, the ALJ found Hudson met the listing of mental impairments—a listing whose promulgation was required by Congress in the Social Security Disability Benefits Reform Act of 1984. The ALJ recommended that Hudson was disabled since May 15, 1981.[1] The Appeals Council accepted the ALJ's recommendation and determined pursuant to Hudson's September 3, 1981, application that Hudson was disabled since May 15, 1981.

Hudson sought attorney fees pursuant to the Equal Access to Justice Act. The district court denied Hudson's petition for attorney fees. This timely appeal followed.

[1] The ALJ's decision paragraph initially recommended, because of a typographical error, an onset date of May 15, 1982. Hudson's attorney pointed out the error and the ALJ revised the onset date to May 15, 1981.

II.

A. Any Award at All?

The Equal Access to Justice Act provides in relevant part that:

> a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was *substantially justified* or that special circumstances make an award unjust.

28 U.S.C.A. § 2421(d)(1)(A) (emphasis added).[2]

This Court recently addressed the standards of appellate review:

> The standard for substantial justification is one of reasonableness. The government must show that its case had a reasonable basis both in law and fact. The test is "more than mere reasonableness."
>
> On review, this court must uphold the district court's denial of an allowance of attorney's fees in the absence of an abuse of discretion. This standard of review requires that we give great deference to a district court's findings of fact, but allows for close scrutiny of its rulings on questions of law.
>
> The government bears the burden of showing that its position was substantially justified.

Stratton v. Bowen, 827 F.2d 1447, 1449-50 (11th Cir. 1987) (citations and footnote omitted).

[2] This Court recently noted that "Congress made it clear that 'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action was based." *Stratton v. Bowen*, 827 F.2d 1447, 1449 n.2 (11th Cir. 1987).

The district court denied Hudson's petition because it found the Secretary's petition was "substantially justified":

> When the plaintiff filed her second application she submitted new evidence which was relied on by the administrative law judge in making a determination that the plaintiff was disabled. This evidence was not before the first administrative law judge. During the time the plaintiff's first case was on appeal the Social Security Disability Benefits Reform Act of 1984 was passed. On remand the administrative law judge was instructed to apply the new regulations in evaluating the plaintiff's mental impairments.
>
> When only the evidence before the administrative judge on the initial application is considered this court is persuaded that the Secretary has carried his burden of showing his position was substantially justified.

Hudson v. Bowen, No. 83-A-0632-J, slip op. at 4 (N.D.Ala. Apr. 28, 1987). The Secretary argues his position was substantially justified on three grounds.[3] We can not agree.

1. *Failure to Follow Own Regulations*

In *Hudson I,* this Court determined that the Secretary failed to follow her own regulations. Specifically, 20 C.F.R. § 404.1522 provided that "we can combine unrelated impairments to see if together they are severe enough to keep you from doing substantial gainful ac-

[3] The Secretary also points out that the *Hudson I* Court determined that some of the Secretary's positions were valid. *See* 755 F.2d at 784-85. This is without consequence; *all* of the Secretary's positions have to be substantially justified. *See Haitian Refugee Center v. Meese,* 791 F.2d 1489, 1499-1500 (11th Cir. 1986).

tivity. We will consider the combined effects of unrelated impairments only if all are severe and expected to last 12 months."

The Secretary points to a portion of *Hudson I* to argue that the position was substantially justified. In *Hudson I,* this Court observed:

> Appellee [the Secretary] contends that the ALJ must consider the impairments in combination only when each impairment individually is severe. Section 404.1522 is *ambiguous*[.] The first sentence indicates that non-severe impairments will be combined to determine whether together they render an individual disabled. The following sentence contains *ambiguous* language. If the word "all" refers to "unrelated impairments" then the sentence may support appellee's contention that each impairment individually must be severe, *but this would conflict with the preceding sentence.* If "all" is interpreted as modifying "combined effects," there is no conflict since the sentence simply states that an ALJ will consider combined effects in his disability determination only if those effects are severe.
>
> This court has implicitly adopted the latter construction and *has consistently required that impairments be considered in combination even when the impairments considered separately are not severe. See Bowen [v. Heckler,* 748 F.2d 629 (11th Cir.1984)]; *Reeves v. Heckler,* 734 F.2d 519 (11th Cir.1984); *Brenem v. Harris,* 621 F.2d 688 (5th Cir.1980); *Strickland v. Harris,* 615 F.2d 1103 (5th Cir.1980). We continue to do so.

755 F.2d at 785 n. 2 (emphasis added).

The Secretary contends that this Court's recognition of "ambiguous" language indicates that the Secretary's posi-

tion was substantially justified. The Secretary, however, reads *Hudson I*'s language too broadly. The *Hudson I* Court noted that the second sentence was ambiguous by itself, but was not ambiguous in context with the first sentence (especially because of this Court's longstanding requirement of evaluating impairments in combination). Consequently, the Secretary cannot defend his position by relying on *Hudson I*.

The Secretary next contends that the position was substantially justified based upon Congress's subsequent passage of the Social Security Disability Benefits Reform Act of 1984. In the Disability Amendments, Congress expressly required that "the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity [to qualify the claim for disability benefits]." 42 U.S.C.A. § 423(d)(2)(C). The Secretary also points to passages in the legislative history[4] expressing displeasure that impairments were not being considered in combination. The Disability Amendments and their accompanying legislative history, however, do not support the Secretary's argument because this Circuit had long required the Secretary to consider impairments in combination.

The Secretary points out that *McSwain v. Bowen*, 814 F.2d 617, 620 (11th Cir.1987), determined that the Disability Amendments do not apply retroactively and thus the ALJ did not need to consider the combined effects of unrelated impairments. That part of *McSwain*, however, directly contradicts *Hudson I* and the cases cited in foot-

[4] *See* H.R.Conf.Rep. No. 1039, 98th Cong., 2d Sess. 29, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3080, 3087; H.R.Rep. No. 618, 98th Cong., 2d Sess. 14, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3038, 3051-52.

note 2 of *Hudson I*. Consequently, we choose to follow *Hudson I*. We therefore conclude that the Secretary's position based upon failure to follow regulations could not be substantially justified.

2. *Lack of Specificity*

In *Hudson I*, this Court held that the Secretary could not accept an ALJ recommendation when the ALJ failed to articulate, with requisite specificity, the reasons for her decision. The Secretary cannot claim the position was substantially justified when he accepted the conclusory statement that the ALJ had "carefully considered all the testimony given at the hearing and the documents described in the List of Exhibits. . . ."

As recognized in *Hudson I*, this Court has long held that such conclusory statements are unacceptable. *See Cowart v. Schweiker*, 662 F.2d 731, 735 (11th Cir.1981) ("This statement tells us nothing whatsoever—it goes without saying that the ALJ gave the testimony the weight he believed should be accorded to it. What is required is that the ALJ state specifically the weight accorded to each item of evidence and why he reached that decision. In the absence of such a statement, it is impossible for a reviewing court to determine whether the ultimate decision on the merits of the claim is rational and supported by substantial evidence."). We therefore conclude that the Secretary's position based upon the lack of specificity could not be substantially justified.

3. *Intervening Events*

The Secretary argues (and the district court agreed) that the position was substantially justified on the basis of the evidence before the ALJ at the time of the initial application. The Secretary claims that the ALJ eventually

found Hudson disabled because of new evidence and the intervening Disability Amendments which set up new evaluation procedures for persons claiming mental impairment. In other words, the Secretary argues that, if he had followed his regulations and if the ALJ had set forth the reasons for her decision with requisite specificity, as required by *Hudson I,* then Hudson properly would have been denied benefits at the time of her September 1981 application.

We cannot agree with the Secretary's argument. When Hudson first applied for benefits, the Secretary denied her benefits. The Secretary took the position that Hudson's impairments need not be evaluated in combination and that an ALJ recommendation that failed to articulate the reasons for the ALJ's decision with requisite specificity could be accepted. *Hudson I* rejected the Secretary's position and, as demonstrated above, the Secretary's position on those two grounds was not substantially justified. Even assuming that the Secretary has accurately characterized the basis for the ALJ's grant of benefits on remand, we will not permit the Secretary now to claim that the position was substantially justified on a basis that should have been raised on the appeal of *Hudson I.*[5] In addition, the Secretary's argument would force this Court to do what the Secretary should have done in the first place. We could find the Secretary's position substantially justified only by evaluating Hudson's impairments in combination and setting forth reasons for that determination with requisite specificity based upon the evidence before the ALJ at the

[5] Because the Secretary never claimed during *Hudson I* that even if Hudson's impairments had been examined in combination Hudson would not be entitled to benefits, we question whether the Secretary can now claim that this was a "position of the United States" within the EAJA's language.

time of the first denial. We decline to engage in such a determination.

B. Fees for Time Spent on Remand

Having determined that the district court abused its discretion in not awarding attorney fees, we provide some guidance for the district court on remand.[6] Specifically, the parties dispute whether Hudson's award can include attorney fees for work done at the administrative level after *Hudson I*'s remand.[7]

In *Taylor v. Heckler,* 778 F.2d 674, 676 (11th Cir.1985), this Court observed in dicta that Social Security Act "proceedings at the administrative agency level are excluded from [the EAJA's] coverage." Hudson argues that the Supreme Court disavowed *Taylor*'s dicta in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* __ U.S. __, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986). In *Delaware Valley,* the Supreme Court held that a court could award attorney fees for time spent at administrative proceedings to enforce a consent decree. The crux of the Court's decision was that Congress's use of the word "action" in the Clean Air Act's fee-shifting provision did not exhibit congressional intent that the provision apply only to judicial, and not administrative, proceedings. 106 S.Ct. at 3094-96.

[6] Hudson asks that this Court determine the attorney fees award. Because the Secretary contests Hudson's claimed hours and hourly rates, we remand to the district court for consideration of an appropriate fee award.

[7] We note that Hudson can get attorney fees for this appeal. Such a conclusion accords with Congress's clear intent that "fees incurred by a party when a fee award or denial [by an agency] is appealed are recoverable as part of the final fee award." H.R.Rep. No. 120, 99th Cong., 1st Sess. 16-17 (part I), *reprinted in* 1985 U.S.Code Cong. & Admin.News 132, 145.

Delaware Valley is inapposite here. The EAJA clearly differentiates between judicial and administrative proceedings. Section 2412(d)(1)(A) is limited to judicial proceedings. In contrast, 5 U.S.C.A. § 504 governs administrative proceedings. Section 504(a)(1) provides in relevant part that

> [a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

Section 504(b)(1)(C) provides that "adversary adjudication" means "an adjudication . . . in which the position of the United States is represented by counsel or otherwise. . . ."

The Secretary argues that "[d]uring the remand proceedings before the Social Security Administration in this case, the government was not represented by counsel and therefore an adversary adjudication was not conducted." Appellee's Brief at 26. We reject this argument and conclude that attorney fees are permissible for time spent after remand.

Congress had the following purpose when it adopted the EAJA:

> The bill rests on the premise that certain individuals . . . may be deterred from seeking review of . . . unreasonable government action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. The purpose of the bill is to reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees. . . .

H.R.Rep. No. 1418, 96th Cong., 2d Sess. 5-6, *reprinted in* 1980 U.S.Code Cong. & Admin. News 4984, 4984. In addition, "[t]he bill rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy." *Id.* at 10, *reprinted in* 1980 U.S.Code Cong. & Admin.News at 4988.

Congress expressly chose "[t]o exclude administrative proceedings under the Social Security Act." *Id.* at 12, *reprinted in* 1980 U.S.Code Cong. & Admin.News at 4991. Congess sought to narrow the scope of the EAJA to make its costs acceptable. *Id.* at 14, *reprinted in* 1980 U.S.Code Cong. & Admin.News at 4993. In addition, Congress limited administrative proceedings to "adversary adjudications" in which the position of the United States was represented because "[i]t is basic fairness that the United States not be liable in an administrative proceeding in which its interests are not represented." *Id.* at 12, *reprinted in* 1980 U.S.Code Cong. & Admin.News at 4991.

Legislative history developed during Congress's extension on EAJA in 1985 also illuminates congressional intent:

> One issue which needs clarification is what coverage, if any, is allowed under the Equal Access to Justice Act for Social Security Administration hearings at the administrative level. As enacted in 1980, the Act covers "adversary adjudications"—i.e., an adjudication under section 554 of title 5, United States Code "in which the position of the United States is

> *represented by counsel* or otherwise." (Emphasis added) (See section 504(b)(1)(C) of title 5, United States Code). While this language generally excludes Social Security administrative hearings from the Act, Congress made clear in 1980 that "If * * * the agency does take a position at some point in the adjudication, the adjudication would then become adversarial," and thus be subject to the Act.

H.R. Rep. No. 120, 99th Cong., 1st Sess. 10 (part 1) (footnote omitted), *reprinted in* 1985 U.S.Code Cong. & Admin.News 132, 138.[8]

This language indicates that the critical determination is whether the Secretary has staked out a position. We be-

[8] Of particular relevance is that *all* of the cases cited by this Court in support of its dicta in *Taylor* were decided *before* EAJA's 1985 extension. For example, the Eighth Circuit relied on EAJA's original 1980 legislative history to conclude that a claimant was not entitled to attorney fees for work performed in administrative proceedings after the district court's remand. *Cornella v. Schweiker,* 728 F.2d 978, 988-89 (8th Cir.1984). The 1985 legislative history counsels otherwise.

In addition, the Eighth Circuit in *Cornella* did not examine the following language from EAJA's original 1980 legislative history:

> The conference substitute defines adversary adjudication as an agency adjudication defined under the Administrative Procedures Act where the agency takes a position through representation by counsel or otherwise. It is intended that this definition precludes an award in a situation where an agency, e.g., the Social Security Administration, does not take a position in the adjudication. *If, however, the agency does take a position at some point in the adjudication, the adjudication would then become adversarial.*

H.R.Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23 (emphasis added), *reprinted in* 1980 U.S.Code Cong. & Admin.News 5003, 5012. The emphasized language, quoted with approval in the 1985 legislative history, suggests that the *Cornella* decision may not be good law on the issue presented by this appeal.

lieve that this language applies equally to those cases where the Secretary accepts an ALJ's denial of benefits and then the Secretary proceeds to litigate that position before a district court (and, as here, a court of appeals). The Secretary certainly has taken the position that the claimant is not entitled to benefits. At such a point, the case becomes adversarial and that the Secretary chooses not to have representation on remand does not change our belief that the proceeding has become adversarial.[9]

[9] Our holding that Hudson is entitled to attorney fees for work done after remand is not inconsistent with the statement in the 1985 legislative history that "[t]he Committee [on the Judiciary] rejected, by a vote of 12 to 19, an amendment offered by Mr. Morrison relating to remands of Social Security Act cases." *Id.* at 6, *reprinted in* 1985 U.S.Code Cong. & Admin. News at 134-35. We have obtained a copy of Representative Morrison's rejected amendment. The rejected amendment would have effected two changes. First, 28 U.S.C.A. § 2412(d)(1)(B) would have read in relevant part (the emphasized language indicates the text of the rejected amendment):

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, *or in the case of a prevailing party described in paragraph (2)(I) of this subsection, within 30 days after the remand is ordered,* submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection. . . .

Second, 28 U.S.C.A. § 2412(d)(2)(1) would have been added:

> (I) "prevailing party" in a civil action includes a party who, pursuant to section 205(g), 221(d), or 1631(c)(3) of the Social Security Act (2 U.S.C. 405(g), 421(d), or 1383(c)(3)), has won an order remanding the cause for further hearing, except in a case re-

Accordingly, REVERSED and REMANDED.

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manded pursuant to section 2(d) of the Social Security Disability Benefits Reform Act of 1984.

We read the rejected amendment as a response to those cases holding that a claimant was not a prevailing party within the meaning of EAJA if the claimant had been accorded a remand only (i.e., had not yet been determined eligible for benefits). *See, e.g., Miller v. Schweiker,* 560 F.Supp. 838 (M.D.Ala. 1983). Because Hudson's appeal does not present the issue the rejected amendment sought to address, we adhere to our conclusion that Hudson is entitled to a fee award for work done after remand.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

No. 83-A-0632-J

ELMER HUDSON, PLAINTIFF

v.

OTIS R. BOWEN SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

U.S. DISTRICT COURT N.D. OF ALABAMA C.T. OLIVER, CLERK

[Filed April 28, 1987]

MEMORANDUM OPINION

This matter is before the court on a motion filed by Richard Ebbinghouse, counsel for the plaintiff, asking that attorney's fees be set pursuant to 28 U.S.C. § 2412(d) (Equal Access to Justice Act).

The court has reviewed the entire record, heard oral arguments and reaches the conclusion that the facts in this case do not warrant such an award.

In 1981 Elmer Hudson filed applications for disability insurance benefits and supplemental security income. Ms. Hudson alleged that she had become disabled in May 1981 because of arthritis in her legs and back. These applications were denied administratively and the plaintiff appealed to this court. In an order dated December 12, 1983 this court concluded that the Secretary's decision was sup-

ported by substantial evidence and should be affirmed. This decision was appealed to the Eleventh Circuit Court of Appeals.

Subsequent to the decision of the district court, but prior to filing the appeal, Hudson filed a second application for benefits alleging an onset date of October 1, 1982. A decision on this application was handed down before a decision from the court of appeals on the first applications. On the second application the administrative law judge found that the plaintiff was disabled due to severe depression. The medical evidence of severe depression had not been part of the first application. The second administrative law judge also reopened the first case and determined the onset date to the August 30, 1982.

Approximately one month after benefits were granted, the Eleventh Circuit issued its opinion on the first applications, vacating the decision of the district court and instructing the court to remand the case for further proceedings.

Ultimately another hearing was conducted for the purpose of taking additional evidence on the nature and severity of the plaintiff's psychiatric impairment from the date of onset alleged in the initial complaint to the onset date established by the administrative law judge on the second application. It was eventually determined that the plaintiff had been disabled since May 15, 1981.

The only issue before the court now is whether the plaintiff is entitled to have her attorney's fees paid pursuant to 28 U.S.C. § 2412(d) (EAJA).

The Equal Access to Justice Act provides, in part, that:

> [A] court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the

> United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

The Equal Access to Justice Act sets forth two requirements for an award of attorney's fees: first, the court must find that the claimant was a "prevailing party"; second, the court must determine whether the positions of the United States was "substantially justified" or any "special circumstances" would make an award of fees unjust.

While the Secretary expresses some doubt as to whether or not this plaintiff is truely a prevailing plaintiff, he argues more fervently that his position in denying Ms. Hudson's benefits was substantially justified.

The standard for substantial justification is one of reasonableness. The government has the burden of showing its position has a reasonable basis in both law and fact. *White* v. *United States,* 740 F.2d 836 (11th Cir. 1984); *Matthews* v. *United States,* 713 F.2d 677 (11th Cir. 1983). Substantial justification involves both the litigation position and the position of the government. 28 U.S.C. § 2412(d)(2)(D). The fact that the plaintiff was ultimately awarded benefits does not raise a presumption that the government's position was not substantially justified. See, *White* v. *United States,* 790 F.2d 836 (11th Cir. 1984).

When the plaintiff filed her second application she submitted new evidence which was relied on by the administrative law judge in making a determination that the plaintiff was disabled. This evidence was not before the first administrative law judge. During the time the plaintiff's first case was on appeal the Social Security Disability

Benefits Reform Act of 1984 was passed. On remand the administrative law judge was instructed to apply the new regulations in evaluating the plaintiff's mental impairments.

When only the evidence before the administrative judge on the initial application is considered this court is persuaded that the Secretary has carried his burden of showing his position was substantially justified.

On the basis of the foregoing reasons, the plaintiff's petition for attorney's fees pursuant to 28 U.S.C. § 2412(d) (Equal Access to Justice Act) is hereby denied.

An appropriate order in conformity with this memorandum opinion will be entered.

This the 28th day of April, 1987.

/s/ C. W. ALLGOOD
Senior United States
District Judge

APPENDIX C

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

In the case of	Claim for
Elmer Hudson	Period of Disability, Disability Insurance Benefits and Supplemental Security Income
(Claimant)	
	419-56-3075
(Wage Earner) (Leave blank if same as above)	(Social Security Number)

The United States District Court of Appeals for the 11th Circuit, and the United States District Court for the Northern District of Alabama, remanded this case (Civil Action Number 83-A-0632-J), to the Secretary of Health and Human Services for further administrative action. Therefore, the Appeals Council remanded the case to an Administrative Law Judge.

On June 25, 1986 and July 23, 1986, the Administrative Law Judge issued recommended decisions and advised the claimant and counsel that any exception, objection, or comment concerning the recommended decision should be filed with the Appeals Council within twenty (20) days. None has been received.

In its review of the Administrative Law Judge's recommended decision of June 25, 1986, amended on July 23,

1986, the Appeals Council notes that although the evidence and testimony of the medical advisor show that during the period May 15, 1981 to August 30, 1982, the claimant equallied Listing 12.04, and although the Administrative Law Judge so ruled, the Psychiatric Review Technique Form attached to the recommended decision shows that the claimant met Listing 12.04. Therefore, the Appeals Council has completed the attached Psychiatric Review Technique Form showing that during the period May 15, 1981 to August 30, 1982, the claimant equalled Listing 12.04.

The Appeals Council also notes that the claimant filed concurrent Title II and Title XVI claims on January 23, 1984 (Exhibits B-2 and B-8). The evidence submitted with those claims shows that the claimant's emotional problems did not remain static or improve; rather it deteriorated to the point where she met Listing 12.04 as was found by an Administrative Law Judge in his decision of February 23, 1985. Accordingly, the Appeals Council finds that during the period May 15, 1981 to August 30, 1982, the claimant's emotional impairment equalled Listing 12.04. Since August 30, 1982, the claimant's emotional impairment has met Listing 12.04. Accordingly, the Appeals Council finds that the claimant's disability commenced on May 15, 1981, and continues through the date of this decision.

The Appeals Council's remand order of December 14, 1985, referred to the Title II claim of September 31, 1981 (Exhibit 1) only, and omitted reference to the Title XVI claim also filed on September 3, 1981 (Exhibit 5), which had been before the court. The Administrative Law Judge ruled only on the Title II claim. There is no evidence that the claimant has dropped the Title XVI claim. Therefore, the Appeals Council hereby reinstate the Title XVI claim of September 3, 1981. As the medical criteria

for a finding of disability under Titles II and XVI are the same, the Appeals Council finds that all reference to the finding of a period of disability under Title II also apply to the Title XVI claim.

The Appeals Council adopts the recommended decisions of June 25, 1986 and July 23, 1986, as herein modified, and holds that, based on the application filed on September 3, 1981, the claimant is entitled to a period of disability commencing on May 15, 1981, and to disability insurance benefits under the provisions of section 216(i) and 223, respectively, of the Social Security Act, as amended.

It is the further decision of the Appeals Council that, based on the application filed on September 3, 1981, the claimant has been disabled under section 1614(a)(3) of the Social Security Act.

The component of the Social Security Administration responsible for authorizing supplemental security income payments will advise the claimant regarding the non-disability requirements and, if eligible, the amount and the month(s) for which payment will be made.

APPEALS COUNCIL

_____

_____

Date: October 22, 1986

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

RECOMMENDED DECISION

In the case of Elmer Hudson	Claim for Period of Disability and Disability Insurance Benefits
(Claimant)	
	419-56-3075
	(Social Security Number)

This case is before the Administrative Law Judge upon Order of Remand of the United States District Court for the Northern District of Alabama.

ISSUES

The general issue before the Administrative Law Judge is whether the claimant is entitled to a period of disability and to disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act, as amended. The specific issues are whether the claimant is under a "disability" as defined in the Act, as amended, and if so, when such "disability" commenced and the duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement.

APPLICABLE PROVISIONS OF LAW

Section 216(i) of the Social Security Act (42 U.S.C. 416 (i)) provides for the establishment of a period of disability

and Section 223 (42 U.S.C. 423) of the Act provides for the payment of disability insurance benefits where the requirements specified therein are met.

Section 223(d)(1) of the Act, as pertinent herein, defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months."

Section 223(d)(2)(A) of the Act provides, as pertinent herein, that an individual shall be determined to be under a disability only if his physical or mental impairment (or impairments) are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. Work which exists "in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

Section 223(d)(3) of the Act provides: "For purposes of this subsection, a 'physical or mental impairment' is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

Section 223(d)(5) of the Social Security Act, as amended, provides than an individual shall not be considered to be under a disability unless he furnishes such medical or other evidence of the existence thereof as the Secretary may require.

Pursuant to the authority of the Social Security Act, the Secretary of Health and Human Services has promulgated Regulations No. 4 of the Social Security Administration which is codified as part 404 of Title 20 of the Code of Federal Regulations (20 CFR 404.1 et seq.).

Section 404.1508 of Regulations No. 4 (20 CFR 404.1508), as pertinent, herein, provides that if you are not working, your physical and mental impairments will be considered first in determining whether you are disabled. Your impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques and must be established not only by your statement of symptoms, but also by medical evidence consisting of signs, symptoms, and laboratory findings.

Section 404.1520(d) of Regulations No. 4 (20 CFR 404.1520(d)), as pertinent herein, provides that if you have an impairment which meets the duration requirement and is listed in Appendix 1 to Subpart P, or is determined to be equal to one of the listed impairments, you will be determined to be disabled without consideration of the vocational factors.

EVIDENCE CONSIDERED

The undersigned has carefully considered all the testimony given at the hearing and the documents described in the List of Exhibits attached to this decision.

EVALUATION OF THE EVIDENCE

This case is before the undersigned on Order of the Appeals Council remanding the case to the Administrative Law Judge pursuant to remands from the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Northern District of

Alabama. This case concerns an application for disability insurance benefits filed by the claimant on September 3, 1981, in which the claimant alleged disability from May 15, 1981, due to "arthritis in legs and back." The sole issue in this case is whether the claimant was disabled from May 15, 1981, the claimant's alleged onset date, to August 30, 1982.

The medical evidence of record documents that the claimant has been diagnosed as having borderline intellectual functioning, clinical depression, anxiety, obesity, chronic low back pain, and chronic remittent hypertension. In order to ascertain whether the claimant was disabled from May 15, 1981, to August 30, 1982, the undersigned requested that Charles E. Herlihy, M.D., a medical advisor and psychiatrist, testify at the hearing. Dr. Herlihy testified that from May 15, 1981, to August 31, 1982, the claimant's mental impairments equaled the criteria of Section 12.04 of the Listing of Impairments, pertaining to affective disorders.

After carefully considering the record and Dr. Herlihy's testimony, the undersigned recommends that the claimant be found disabled from May 15, 1981, to August 30, 1982, on the basis that her condition equals the criteria of Section 12.04 of the Listing of Impairments.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act on May 15, 1981, the date the claimant stated she became unable to work, and continues to meet them through the date of this decision.

2. The claimant has not engaged in substantial gainful activity since May 14, 1981.

3. The medical evidence establishes that the claimant has severe borderline intellectual functioning and depression.

4. The severity of the claimant's impairments equals the requirements of Section 12.04, Appendix 1, Subpart P, Regulations No. 4 and has precluded her from working for at least 12 continuous months (20 CFR 404.1526).

5. The claimant was under a "disability, as defined in the Social Security Act, beginning May 15, 1981, and extending to August 30, 1982 (20 CFR 404.1520(d)).

RECOMMENDED DECISION

It is the recommended decision of the Administrative Law Judge that, based on the application filed on September 3, 1981, the claimant is entitled to a period of disability commencing May 15, 1982 and to disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act and that the claimant's disability extended through August 30, 1982.

/s/ SAMUEL A. MONTGOMERY
Administrative Law Judge
Room 420, West Oxmoor Tower
11 West Oxmoor Road
Birmingham, AL 35209

Date: June 25, 1986

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

REVISED DECISION

In the case of	Claim for
Elmer Hudson	Period of Disability and Disability Insurance Benefits
(Claimant)	
	419-56-3075
	(Social Security Number)

On June 25, 1986, the undersigned issued a recommended decision finding the claimant was under a "disability," as defined in the Social Security Act, beginning May 15, 1981, and extending to August 30, 1982. Erroneously, the decision paragraph cites the date of onset of disability as May 15, 1982. Therefore, the decision paragraph is hereby amended to reflect that it is the recommended decision of the Administrative Law Judge that, based on the application filed on September 3, 1981, the claimant is entitled to a period of disability commencing May 15, 1981, and to disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act and that the claimant's disability extended through August 30, 1982.

/s/ SAMUEL A. MONTGOMERY
Administrative Law Judge
Room 420, West Oxmoor Tower
11 West Oxmoor Road
Birmingham, AL 35209

Date: July 23, 1986

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL
REMANDING COURT CASE TO AN
ADMINISTRATIVE LAW JUDGE

In the case of Elmer Hudson	Claim for Period of Disability and Disability Insurance Benefits
(Claimant)	
	419-56-3075
(Wage Earner) (Leave blank if same as above)	(Social Security Number)

The United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Northern District of Alabama have remanded this case to the Secretary of Health and Human Services for further administrative action. Therefore, the Appeals Council vacates its denial of the claimant's request for review and the decision of the Administrative Law Judge issued on September 30, 1982 and remands this case to an administrative law judge for further proceedings consistent with the order of the court.

The Appeals Council notes that the claimant filed new applications for disability insurance benefits and supplemental security income on January 23, 1984. In a decision issued on February 23, 1985, an Administrative Law Judge reopened the hearing decision of September 30, 1982 and found that, based on her applications filed on

September 3, 1981, the claimant was entitled to a period of disability beginning on August 30, 1982 and to disability insurance benefits and that she had been disabled under Title XVI of the Social Security Act since August 30, 1982. (The Appeals Council notes that the Administrative Law Judge did not have jurisdiction to reopen the hearing decision of September 30, 1982 because of the pending civil action and that he should have issued a recommended decision.)

The period now at issue extends from May 1981, the month in which the claimant stated she became unable to work, to August 30, 1982.

Upon remand, the Administrative Law Judge shall provide the claimant an opportunity to testify at a supplemental bearing and to submit additional evidence. He may wish to obtain the testimony of a medical advisor as to the nature and severity of the claimant's psychiatric impairment during the remaining period at issue.

Section 5 of the Social Security Disability Benefits Reform Act of 1984 (Public Law 98-460) required the Secretary to publish revised regulations for determining disability due to mental disorders. The revised regulations were published in the *Federal Register* (Vol. 50, No. 167) on August 28, 1985. The Administrative Law Judge shall apply these regulations in evaluating any mental impairment the claimant may have.

The Administrative Law Judge may take any further action necessary to complete the administrative record. Upon completion of all proceedings, the Administrative Law Judge shall issued a recommended decision with a completed Psychiatric Review Technique form.

The claimant and attorney will be given the opportunity to file with the Appeals Council, within 20 days from the date of notice of the recommended decision, briefs or

other written statements of exceptions and comments as to the applicable facts and law. After the 20-day period has expired, the Appeals Council will review the record and issue its decision.

APPEALS COUNCIL

/s/ ANDREW S. WAKSHUL
ANDREW E. WAKSHUL, MEMBER

/s/ VERRELL L. DETHLOFF, JR.
VERRELL L. DETHLOFF, JR., MEMBER

Date: December 14, 1985

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

419-56-3075
Civil Action No. 83-A-0632-J

ELMER HUDSON, PLAINTIFF

v.

MARGARET M. HECKLER SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

[Filed July 24, 1985]

ORDER

The Eleventh Circuit Court of Appeals, on March 19, 1985, vacated the order of the district court affirming the decision of the Secretary that the plaintiff is not disabled and instructed the court to remand the case to the Secretary. The Court of Appeals found the Secretary had failed to follow her own regulations in failing to consider whether the combination of impairments rendered the plaintiff disabled. The Secretary also failed to explain the weight accorded each of the physician's reports.

For the above reasons, it is ORDERED that this case be, and the same hereby is, REMANDED to the Secretary for further consideration.

DONE, this the 23rd day of July, 1985.

/s/ C. W. ALLGOOD
Senior United States
District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 84-7098

ELMER HUDSON, PLAINTIFF-APPELLANT

v.

MARGARET M. HECKLER SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

March 19, 1985

Before: GODBOLD Chief Judge, ANDERSON, Circuit Judge, and THORNBERRY*, Senior Curciut Judge.

PER CURIAM:

The Secretary denied disability insurance and SSI benefits to a 44 year-old woman who is obese and suffers from chronic low back pain, chronic intermittent hypertension, a mild to moderate dysthymic disorder, and a histrionic personality disorder. The district court found substantial evidence to support the Secretary's decision and affirmed. Because the Secretary failed to follow her own regulations, we vacate and remand for further consideration under proper legal standards.

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* Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

FACTS

Appellant Elmer Hudson completed the ninth grade and has been employed as a janitor and a domestic worker. She last worked in May 1981. Appellant filed for disability benefits in September 1981.

The medical evidence shows that Hudson was examined by Dr. Featheringill, an orthopedic specialist, in October 1981. He noted obesity and some limitation in appellant's movement but could not determine the etiology for her back pain. Appellant was subsequently examined by Dr. Mosley who made a diagnosis similar to that of Dr. Featheringill. He found some tenderness in Hudson's lower back but no apparent limitation in her movement and no obvious etiology for her pain, although he believed that appellant's complaints were sincere. Dr. Mosley also found that Hudson suffered from chronic intermittent hypertension. In addition the doctor completed a physical capabilities evaluation questionnaire and concluded that appellant had some mild restrictions on her physical capabilities.

Appellant's application for benefits was denied initially and on reconsideration. She requested and received a hearing before an administrative law judge, where she was represented by a paralegal provided by the Legal Services Corporation of Alabama. At the hearing appellant testified that she suffered from back pain, depression, and nervousness. She cried throughout the hearing. Dr. Steward, a vocational expert, also testified. He stated that, based upon Dr. Mosley's evaluation, appellant could perform domestic work. He also testified, however, that appellant would not be employable if her continuous crying had a medical basis.

The ALJ ordered a post-hearing psychiatric examination by Dr. Anderson. The ALJ notified appellant's

representative of the examination and invited a response to Dr. Anderson's report. Appellant's representative chose instead to have her undergo an additional examination by a psychologist, Dr. Meyers. His report was submitted to the ALJ.

Dr. Anderson noted that appellant's weeping was appropriate to the context of their conversations. He found her intelligence to be low average and her mood mildly to moderately depressed. Dr. Anderson diagnosed appellant as suffering from a mild to moderate dysthymic disorder and a histrionic personality disorder. He found no evidence of neurological impairment. The doctor also noted appellant's complaints of pain. He concluded that her psychiatric condition would not significantly interfere with her ability to work. He did not, however, consider the possible effect of an interaction between appellant's pain and psychiatric condition.

Dr. Meyers found that Hudson was moderately to severely depressed. He observed that appellant suffered from insomnia, fatigue, psychomotor retardation, tearfulness, and anxiety. He concluded that her psychological problems, mild physical disabilities, and pain combined to render her unemployable absent exhaustive rehabilitative efforts.

After the submission of these two post-hearing evaluations, the ALJ rendered her decision and found that appellant was not disabled because she could perform work similar to that which she had done in the past.

DISCUSSION

Several of appellant's contentions are without merit. The evidence submitted by appellant's treating physician, Dr. Scarborough, received all the consideration it was due. Dr. Scarborough saw appellant twice and submitted only

sketchy, conclusory notes. The opinion of a "treating physician may be rejected when it is so brief and conclusory that it lacks persuasive weight or when it is unsubstantiated by any clinical or laboratory findings." *Bloodsworth v. Heckler,* 703 F.2d 1233, 1240 (11th Cir. 1983).

The ALJ's finding that appellant's pain was not disabling was not based on an improper use of objective evidence. The ALJ did not ignore appellant's subjective complaints of pain; she simply found them not credible to prove disabling pain. This credibility determination was for the Secretary, not the courts. *Bloodsworth v. Heckler, supra.* Moreover, the ALJ did not require objective proof that appellant was in pain. She instead properly inquired whether there was an underlying impairment or a cause of the pain that was medically determinable. *See Wiggins v. Schweiker,* 679 F.2d 1387 (11th Cir.1982).

Finally, the failure of appellant's representative to cross-examine Dr. Anderson did not render appellant's hearing "fundamentally unfair." Due process is violated when a claimant is denied the opportunity to subpoena and cross-examine those who submit medical reports. *See Richardson v. Perales,* 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); *Cowart v. Schweiker,* 662 F.2d 731 (11th Cir.1981); *Lonzollo v. Weinberger,* 534 F.2d 712 (7th Cir.1976). Appellant had the opportunity to cross-examine Dr. Anderson but chose to waive her right.

Appellant insists that there was no waiver of the right to cross-examine because the ALJ did not tell appellant's representative—a paralegal—that her client had such a right. Moreover, appellant argues, the ALJ may have unintentionally misled the paralegal when she wrote her informing her that she could respond to Dr. Anderson's psychiatric evaluation. Since cross-examining the doctor

was not included among the suggested methods of response, appellant's representative might have assumed that cross-examination was not an available option. Under these circumstances, concludes appellant, the court should not find that the right to cross-examine Dr. Anderson was waived.

The cases cited by appellant as support for her position that the ALJ had a duty to instruct appellant's representative as to her right to cross-examine are inapposite here. They involve situations where claimants had no legal representation. The courts consistently recognize their special responsibility toward these claimants. *See, e.g., Cowart v. Schweiker, supra* (ALJ's basic obligation to develop full and fair record rises to level of "special duty" when unrepresented claimant unfamiliar with hearing procedures appears before him). Furthermore, cases relied upon for appellant's suggestion that a letter not expressly listing cross-examination as a method of responding to a post-hearing evaluation indicates no waiver also involve unrepresented claimants. *See, e.g., Lonzollo v. Weinberger, supra.* Again these decisions reflect the court's awareness that the failure to exercise a right does not necessarily imply a knowing waiver when the actor is an individual who probably does not suspect that he possesses such a right. *Cf. Richardson v. Perales, supra* (Court found waiver where claimant represented by attorney simply did not avail himself of opportunity to cross-examine).

While a paralegal may not possess all the legal expertise of an attorney,[1] we are unprepared in this case to treat

[1] We do not hold that we recognize no differences in skill and expertise between a paralegal and an attorney. We simply find that those differences do not justify a "special duty," not owed attorneys, to in-

a paralegal like unrepresented and often unsophisticated claimants completely unfamiliar with the law or with agency practice. Paralegals by definition have some legal training and experience. Those employed by organizations that represent the indigent and that provide representation for claimants before agencies acquire some knowledge of administrative practice.

We find, therefore, that the ALJ had no duty to inform appellant's paralegal representative of her client's right to cross-examine Dr. Anderson. The representative's failure to cross-examine constituted a waiver of the right, and thus no due process violation occurred.

Appellant does correctly contend, however, that the Secretary did not follow her own regulations. In making her disability determination the ALJ found that appellant had the following impairments: obesity, chronic low back pain (no etiology established), chronic intermittent hypertension, a mild to moderate dysthymic disorder, and a histrionic personality disorder. The ALJ decided that separately none of these impairments was so severe as to render appellant disabled. The ALJ, however, did not consider whether the combination of appellant's impairments rendered her disabled. Where a "claimant has alleged a multitude of impairments, a claim . . . may lie even though none of the impairments, considered individually, is disabling." *Bowen v. Heckler,* 748 F.2d 629, 635 (11th Cir.1984). The ALJ, therefore, has a duty to consider the impairments in combination. *See* 20 C.F.R. § 404.1522 (1984).[2] Failure to do so requires that the case be

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form appellant's paralegal representative in this case of the right to cross-examine.

[2] Appellee contends that the ALJ must consider the impairments in combination only when each impairment individually is severe. Section 404.1522 is ambiguous:

vacated and remanded for the proper consideration.[3] *See, e.g., Reeves V. Heckler,* 734 F.2d 519 (11th Cir.1984); *Wiggins v. Schweiker, supra, Strickland v. Harris,* 615 F.2d 1103 (5th Cir.1980).

> [W]e can combine unrelated impairments to see if together they are severe enough to keep you from doing substantial gainful activity. We will consider the combined effects of unrelated impairments only if all are several and expected to last 12 months.

The first sentence indicates that non-severe impairments will be combined to determine whether together they render an individual disabled. The following sentence contains ambiguous language. If the word "all" refers to "unrelated impairments" then the sentence may support appellee's contention that each impairment individually must be severe, but this would conflict with the preceding sentence. If "all" is interpreted as modifying "combined effects," there is no conflict since the sentence simply states than an ALJ will consider combined effects in his disability determination only if those effects are severe.

This court has implicitly adopted the latter construction and has consistently required that impairments be considered in combination even when the impairments considered separately are not severe. *See Bowen, supra; Reeves v. Heckler,* 734 F.2d 519 (11th Cir. 1984); *Brenem v. Harris,* 621 F.2d 688 (5th Cir. 1980); *Strickland v. Harris,* 615 F.2d 1103 (5th Cir.1980). We continue to do so.

[3] Contrary to appellant's position, remand is not warranted under Section Five of the Reform Act which places a moratorium on mental health reviews. The relevant part provides that:

> (c)(1) Any initial determination that an individual is not under a disability by reason of a mental impairment and any determination that an individual is not under a disability by reason of a mental impairment in a reconsideration of or hearing on an initial disability determination, made or held under title II or XVI of the Social Security Act after the date of the enactment of this Act and prior to the date on which revised criteria are established by regulation in accordance with subsection (a), and any determination that an individual is not under a disability by reason of a mental impairment made under or in accordance with title II or XVI of such Act in a reconsideration of, hearing on, review by the Appeals Council of, or judicial review of a decision rendered

The decision rendered by the ALJ also does not make clear the weight accorded the evidence considered. The ALJ, for example, does not explain why she obviously discounts Dr. Meyer's evaluation, and in particular, why she omits from her decision any mention of his consideration of appellant's impairments in combination. The decision only states that the ALJ has "carefully considered all the testimony given at the hearing and the documents described in the List of Exhibits. . . ." As we have noted before:

> [t]his statement tell us nothing whatsoever—it goes without saying that the ALJ gave the testimony the weight he believed should be accorded to it. What is required is that the ALJ state specifically the weight accorded to each item of evidence and why he reached that decision. In the absence of such a statement, it is impossible for a reviewing court to determine whether the ultimate decision on the merits of the claim is rational and supported by substantial evidence.

Cowart v. Schweiker, 662 F.2d at 735; *see also Wiggins v. Schweiker, supra.* On reconsideration the ALJ should articulate the reasons for her decision with the requisite specificity.

VACATED and REMANDED with instructions to remand to the Secretary.

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in any continuing eligibility review to which subsection (bv)(1) applies, shall be redetermined by the Secretary as soon as feasible after the date on which such criteria are so established, applying such revised criteria.

Appellant's initial determination and reconsideration occurred prior to October, 1984, the date of the enactment of the Act.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

No. 83-A-0632-J

ELMER HUDSON, PLAINTIFF

v.

MARGARET M. HECKLER SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

[Filed December 13, 1983]

MEMORANDUM OPINION

The plaintiff, Elmer Hudson, brings this action pursuant to the provisions of Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), seeking judicial review of a final adverse decision by the Secretary of Health and Human Services. Applications for the establishment of a period of disability, under Section 216(i) of the Act, 42 U.S.C. § 416(i), and for disability insurance benefits, under Section 223 of the Act, 42 U.S.C. § 423, were filed on September 9, 1981. Additionally, an application for supplemental security income, under Title XVI of the Act, was filed on September 9, 1981. The applications were denied administratively and that position was sustained on reconsideration by the Social Security Administration. On

March 12, 1982, the plaintiff requested a hearing and on September 30, 1982 an administrative law judge found that she was not entitled to disability insurance benefits. This position was approved by the Appeals Council, thus becoming the final decision of the Secretary for purposes of appeal to the district court. The case is now properly before this court.

The scope of judicial review in disability cases is narrow and limited to determining whether the decision of the Secretary is supported by substantial evidence. *Richardson* v. *Perales*, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 2d 842 (1971); *Western* v. *Harris*, 633 F.2d 1204 (5th Cir. 1981). The court has reviewed the entire record and after a careful consideration of the plaintiff's contentions, is of the opinion that the decision of the Secretary is supported by substantial evidence. Accordingly, the decision of the Secretary must be and the same hereby is affirmed. An appropriate order in conformity with this opinion will be entered.

This the 12th day of December, 1983.

/s/ C. W. ALLGOOD
Senior United States
District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7355
D.C. Docket No. 83-0632

ELMER HUDSON, PLAINTIFF-APPELLANT

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA

[Filed March 14, 1988]

Before: JOHNSON AND CLARK, Circuit Judges, and
DUMBALD*, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is

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* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

hereby, REVERSED; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: March 14, 1988
For the Court: Miguel J. Cortez, Clerk

By: KAREN MCNAVB
Deputy Clerk

ISSUED AS MANDATE: JUNE 1, 1988

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7355

ELMER HUDSON, PLAINTIFF-APPELLANT

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA

[Filed May 24, 1988]

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion March 14, 1988, 11 Cir., 198__, __F.2d__).

Before: JOHNSON AND CLARK, Circuit Judges, and DUMBAULD*, Senior District Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Ap-

* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

pellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ FRANK M. JOHNSON, JR.
United States Circuit Judge

PETITIONER'S

BRIEF

(3)

No. 88-616

In the Supreme Court of the United States

OCTOBER TERM, 1988

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ELMER HUDSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether attorney fees are available under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(3) (Supp. IV 1986), for Social Security administrative proceedings conducted after a judicial remand.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-616

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ELMER HUDSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 839 F.2d 1453. The opinion of the district court (Pet. App. 17a-20a) is unreported.

JURISDICTION

The court of appeals entered judgment on March 14, 1988 (Pet. App. 45a-46a). A petition for rehearing was denied on May 24, 1988 (Pet. App. 47a). On August 11, 1988, Justice Kennedy extended the time for filing a petition for a writ of certiorari to September 12, 1988; on September 9, 1988, he further extended that time to and including October 12, 1988, and the petition was filed on that date. It was granted on December 5, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Equal Access to Justice Act, 5 U.S.C. 504 (Supp. IV 1986) and 28 U.S.C. 2412(d) (Supp. IV 1986), provides in pertinent part:[1]

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust [5 U.S.C. 504(a)(1)].
>
> "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise * * * [5 U.S.C. 504(b)(1)(C)].
>
> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust [28 U.S.C. 2412(d)(1)(A)].
>
> In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust [28 U.S.C. 2412(d)(3)].

[1] Hereinafter, references to the Equal Access to Justice Act are to the version appearing in the 1986 Supplement, unless the context indicates otherwise.

STATEMENT

This is an Equal Access to Justice Act (EAJA) attorney fees case arising out of a claim for Social Security and Supplemental Security Income disability benefits.

1. Respondent's original application for benefits, filed in September 1981, alleged that she had been disabled since May 15, 1981, by a variety of physical problems (Pet. App. 36a). The application was denied, and respondent requested a hearing. Because of respondent's behavior at the hearing, the Administrative Law Judge (ALJ) ordered a post-hearing psychiatric examination, and respondent also chose to submit the report of an additional psyehological examination (*id.* at 36a-37a). After considering both the evidence submitted at the hearing and the reports of the post-hearing examinations, on September 30, 1982, the ALJ denied the application on the ground that respondent's impairments did not prevent her from performing work similar to her previous employment (*id.* at 37a). The Appeals Council approved that decision (*id.* at 44a). On judicial review, the district court affirmed, finding that the Secretary's decision was supported by substantial evidence (*id.* at 43a-44a).

The court of appeals reversed the judgment of the district court, concluding that the Secretary had (1) failed to consider the combined effect of respondent's impairments and (2) failed to explain the weight accorded to the evidence considered (Pet. App. 40a-42a). The case was remanded to the Secretary with instructions to consider respondent's impairments in combination and to articulate the reasons for the decision with greater specificity (*ibid.*).

While the judicial review proceedings were pending, respondent filed a second application for disability benefits on January 23, 1984, alleging that she had been disabled since August 30, 1982. After a hearing on that application, the ALJ on February 23, 1985, found that respondent was disabled by severe depression, reopened the September 30, 1982, decision, and determined the onset date of respondent's disability to be August 30, 1982 (Pet. App. 18a, 30a, 31a). Respondent has been receiving disability benefits since that time.

After the court of appeals issued its remand order on July 23, 1985 (Pet. App. 33a-34a), the case returned to the Appeals Council. Although the Appeals Council noted that the ALJ had technically acted without authority in reopening the September 1982 decision while that decision was still pending on judicial review, it nevertheless concluded that the only period for which the respondent's entitlement remained in dispute was the period between May 15, 1981, and August 30, 1982 (*id.* at 30a-31a). The Appeals Council accordingly remanded the case to the ALJ for a determination of respondent's disability during that period. The Appeals Council instructed the ALJ to "provide the claimant an opportunity to testify at a supplemental hearing and to submit additional evidence" (*id.* at 31a). The Appeals Council also directed the ALJ to apply recently revised regulations on mental impairments, and

suggested that "[h]e may wish to obtain the testimony of a medical advisor" in this connection (*ibid.*).

The ALJ accordingly held a supplemental hearing, at which a psychiatrist—at the ALJ's request—testified about respondent's mental condition (Pet. App. 27a). Based on that expert testimony and other evidence in the record, the ALJ found, based on the 1981 application, that respondent had had a disabling mental impairment continuously since May 15, 1981 (*id.* at 24a-29a).[2] The Appeals Council adopted the ALJ's recommended decision, noting that respondent's 1984 application indicated that her emotional condition had continued to deteriorate (*id.* at 21a-23a).

2. Respondent then filed a petition in district court for attorney fees under the EAJA. The district court found that the Secretary's position had been substantially justified and denied the petition (Pet. App. 17a-20a). The court of appeals again reversed. Concluding that the Secretary had failed to comply with applicable disability regulations, the court of appeals held the district court abused its discretion in finding that the Secretary's position had been substantially justified.[3] Turning to the question of the amount of fees to be awarded, the court held

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[2] Due to a typographical error, the ALJ originally stated that respondent's disability onset date was May 15, 1982 (Compare Pet. App. 27a & 28a para. 5 with 28a concluding para.). When respondent's counsel brought this error to his attention, the ALJ amended his recommended decision to correct the error (Pet. App. 29a; App., *infra*, 1a-2a).

[3] The court of appeals' decision was entered before the Court interpreted the "substantial justification" standard in *Pierce* v. *Underwood*, No. 86-1512 (June 12, 1988). Although we believe that the agency's position was substantially justified throughout the proceedings below, we do not here challenge the largely fact-bound decision that it was not.

that respondent was entitled to fees not only for work performed by her attorney in the judicial review proceedings before the district court and the court of appeals, but also was entitled to recover fees for work performed in the post-remand administrative proceedings.

The court recognized that under 5 U.S.C. 504(a)(1), an EAJA fee award for work related to administrative agency proceedings may be made only if the agency proceeding is an "adversary adjudication," which by statutory definition includes only a proceeding "in which the position of the United States is represented by counsel or otherwise" (5 U.S.C. 504(b)(1)(C)). The court nevertheless asserted that once the Secretary has taken the position through counsel in the district court that the claimant is not entitled to benefits, all subsequent proceedings are necessarily adversarial. In the court's view (Pet. App. 15a), the fact that "the Secretary chooses not to have representation on remand * * * does not change our belief that the proceeding has become adversarial." The court directed the district court, on remand, to determine the amount of the fee award (*id.* at 11a n.6).

SUMMARY OF ARGUMENT

Congress expressly limited EAJA's coverage of administrative proceedings to adversarial adjudications, which it specifically defined as those in which the government's position is represented by counsel or otherwise. The court below refused to apply this statutory definition, and instead read into the statute its own definition of adversary adjudication. Respondent attempts to defend the decision below on the alternative ground that the administrative remand is a part of a continuing judicial action for which fees are available. Neither rationale can be squared with EAJA's language, with the structure of the

statute, or with its legislative history. The statute permits fee awards only in "adversary" administrative proceedings—*i.e.*, those in which the government's position is represented by counsel or otherwise. The government takes no position in Social Security administrative proceedings, either on original consideration or on remand, and accordingly is not represented at those proceedings. In the absence of such representation, the statute precludes the award of attorney fees for representation of the claimant at that stage.

The decision below is wrong even ignoring the limited statutory definition of "adversary" adjudication, because it overlooks the fact that the issues resolved in the judicial proceedings are binding on the Secretary and may not be contested anew at the administrative level. The issues left open on remand are resolved at the administrative level through precisely the same, non-adversarial procedures governing cases before the agency on initial review. Thus, as the record here demonstrates, the administrative proceedings on remand are not adversarial in any sense.

Respondent's alternative argument that the remand proceedings should be considered part of the ongoing process of judicial review for which fees may be awarded is inconsistent with the careful statutory distinction between "civil actions" on the one hand and "adversary adjudications" on the other. The former term refers to the judical part of the process; the latter to the administrative. A court may award a fee for representation in an "adversary adjudication" only on the basis of an evaluation of the government's position in that adjudication. Where, as here, there is no such position, there is simply no basis for an award.

Contrary to the court of appeals' view, the 1985 reenactment of EAJA and its legislative history corroborate Congress's intent to bar fees for Social Security administrative

proceedings. Congress considered and specifically rejected amendments that would have extended EAJA to Social Security administrative proceedings, including those on remand. Instead, it reenacted the same "adversary adjudication" provisions that had universally been construed to foreclose the award of fees in all Social Security administrative proceedings, thereby signifying its intent to adopt and preserve the settled judicial interpretation. See *Pierce* v. *Underwood*, No. 86-1512 (June 27, 1988). Indeed, Congress specifically noted that fees are *not* available for Social Security proceedings on remand. H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 1, at 19-20 (1985).

ARGUMENT

A COURT MAY AWARD EAJA FEES ONLY FOR WORK IN CONNECTION WITH A "CIVIL ACTION" OR AN "ADVERSARY ADJUDICATION"; NEITHER TERM INCLUDES WORK ON SOCIAL SECURITY PROCEEDINGS CONDUCTED PURSUANT TO A REMAND

EAJA consists of two parts, codified in separate sections of the U.S. Code. The first part, 5 U.S.C. 504, permits an agency to award attorney fees to a party who prevails in agency-conducted adversary adjudication (5 U.S.C. 504(a)(1))—which is specifically defined as "an adjudication under Section 554 of this title in which the position of the United States is represented by counsel or otherwise" (5 U.S.C. 504(b)(1)(C)).[4] The second part, 28

[4] The reference in the statutory definition to "an adjudication under section 554 of this title" means that EAJA applies only to administrative proceedings conducted pursuant to the formal adjudication provisions of the Administrative Procedure Act. 5 U.S.C. 554. Accordingly, an "adversary adjudication" can include only administrative adjudications. See also H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23 (1980). The procedures required by the Social Security Act, 42 U.S.C. 301 *et seq.*, for adjudication of disability

U.S.C. 2412(d), provides for the award of such fees by a court in a "civil action." Such an action is defined to include "proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action." Thus, it is clear that EAJA applies to proceedings for judicial review of Social Security disability determinations. But EAJA provides for an award of attorney fees for work performed before the agency on the remand from a judicial review proceeding only if that remand was either an "adversary adjudication" or was part of a continuing "civil action," as those terms are used in the statute. It was neither.

A. Social Security Proceedings Do Not Become Adversarial Adjudications On Judicial Remand

It has long been established—and indeed respondent does not dispute (see Br. in Opp. 13)—that Social Security administrative proceedings are typically non-adversarial.[5] In *Richardson* v. *Perales*, 402 U.S. 389, 403 (1971), the Court stressed that the Social Security Administration "operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary." The agency's ALJs are thus barred from pressing a position on the government's behalf; rather, they are charged with a

claims parallel those required by Section 554 of the APA, but since the government is not represented in these proceedings it is unnecessary in this case to decide whether disability proceedings are conducted "under" the APA. See *Richardson* v. *Perales*, 402 U.S. 389, 409 (1971).

[5] Respondent argues that her case was not typical, because the ALJ reopened her original application and awarded her benefits while the appeal from the original denial of that application was still being litigated, Br. in Opp. 13-17, and because counsel called the ALJ's attention to a typographical error in the June 25, 1986, recommended decision (see note 1, *supra*). Br. in Opp. 16, 18. Neither of these circumstances suggests that the particular agency proceedings with regard to respondent's claim were in any way adversarial.

special duty of inquiry to develop on the *claimant's* behalf a full and fair administrative record. *Id.* at 410; *Heckler* v. *Campbell*, 461 U.S. 458, 471 & n.1 (1983) (Brennan, J., concurring). And, of course, no other agency representative appears in these proceedings to advocate any agency position. It is thus entirely clear that Social Security proceedings are not "adversarial adjudications" under the precise statutory definition contained in EAJA—there is in these proceedings no "position of the United States * * * represented by counsel or otherwise" (5 U.S.C. 504(b)(1)(C)).

The court below did not even attempt to square its ruling with the statutory language. Instead, it simply enunciated a different rule for agency remand proceedings, theorizing that once the government takes a position adverse to the claimant on judicial review, all subsequent agency procedures must be deemed adversarial. But even if the court below were free to ignore the statutory definition of "adversarial adjudication"[6] its decision would still be wrong, because it represents a fundamental misunderstanding of the agency procedures on remand. Social Security administrative proceedings do not in any sense become adversarial when they are the result of a judicial remand. Instead, remand proceedings are conducted in precisely the same way as original adjudications—agency regulations make no distinction between the two situations. See 20 C.F.R. 404.944-404.996; Social Security Admin., Office of Hearings and Appeals Handbook Pt. 1, para. 1-944 (Jan. 1984).

[6] It is of course not free to do so. The court in *Kelly* v. *Bowen*, No. 87-1999 (8th Cir. Dec. 14, 1988), slip op. 6-8, specifically rejected the reasoning of the court below, recognizing that the statutory definition is controlling whether or not a court may believe that some broader definition might be desirable as a matter of policy. As the court in *Kelly* succintly explained, given the statutory definition, "the determinative factor is whether the Secretary was represented by counsel or otherwise at the administrative proceeding, not whether the Secretary has adopted a position" (slip op. 7).

Indeed, given the effect of a remand and the obligations it places on the agency, any differences in procedure would be difficult, if not impossible, to justify. An administrative agency, like any other inferior tribunal, has no power to deviate from a mandate issued by a reviewing court. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *Briggs* v. *Pennsylvania R.R.*, 334 U.S. 304, 306 (1948); *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939). If the Secretary disagrees with the court's decision ordering a remand and wishes to continue to contest that decision—*i.e.*, to maintain his adversarial position—his only recourse is to appeal a final decision to a higher court. See, *e.g.*, *Cohen* v. *Perales*, 412 F.2d 44, 48 (5th Cir. 1969), rev'd on other grounds *sub nom. Richardson* v. *Perales*, 402 U.S. 389 (1971); *Stone* v. *Heckler*, 722 F.2d 464, 467 (9th Cir. 1983). If the Secretary does not appeal, and instead accepts the remand, the reviewing court's resolution of all issues in dispute in the judicial proceeding is binding on the Secretary in the subsequent administrative proceedings. Those issues are simply not open to further adversarial litigation on remand. Indeed, the precise purpose of the remand is to permit the agency to adjudicate issues that were *not* resolved in the judicial proceedings. A remand is necessary only when there are issues remaining in the case, or issues created by the court's decision, as to which the agency has taken no adversarial position, and the post-remand agency adjudication deals only with those issues.

The facts of this case demonstrate the inaccuracy of the lower court's suggestion that the agency's opposition to the award of benefits in court will continue to color the post-remand proceedings. The Appeals Council, acting pursuant to the court's remand, vacated its prior denial of

benefits and instructed an ALJ to conduct a new hearing, using recently amended regulations. The Council also suggested that the ALJ obtain the services of a medical advisor to evaluate the severity of respondent's impairments (Pet. App. 31a). At the subsequent hearing, the government presented no evidence, was not represented by an attorney or any other agent, and in no way pressed a "position" in opposition to respondent's entitlement to benefits. Instead, the ALJ, acting as an adjudicator and not an adversary or advocate for the government, helped the respondent establish an evidentiary record by soliciting the testimony of a medical advisor as recommended by the Appeals Council. This testimony in turn provided an essential basis for finding respondent disabled. Nothing in these post-remand proceedings lends the slightest support to the view that the Secretary's adversarial position in the district court continued to influence the proceedings on remand.

B. Social Security Administrative Proceedings Conducted Pursuant To A Remand Are Not Part Of An EAJA "Civil Action"

Although the decision below rests on other grounds, respondent argues (Br. in Opp. 8-12) that an administrative proceeding conducted pursuant to a remand from a court is simply a continuation of the ongoing judicial review proceedings, and thus is a part of a "civil action" for which fees are available under 28 U.S.C. 2412(d)(1)(A). The plain language of the statute, however, lends no support to this contention. On its face, the provision on which respondent relies (28 U.S.C. 2412(d)(1)(A)) states that the court may award fees incurred "in any civil action * * * brought by or against the United States in any court having jurisdiction of that action * * *." The proceedings on

remand are not brought in a court; rather, they are, by definition, brought before an administrative agency.[7]

Section 2412(d)(3) confirms that Congress used the terms "action" and "civil action" to refer only to proceedings held before a court.[8] That section refers to an "action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5,

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[7] This statutory usage is entirely consistent with the ordinary connotation of the term "civil action", which refers to court proceedings, not proceedings before an agency. The "[t]erm in its usual legal sense means a suit brought in a court; a formal complaint within the jurisdiction of a court of law." Black's Law Dictionary 26 (5th ed. 1979). Similarly, the Federal Rules of Civil Procedure provide that "[t]here shall be one form of action to be known as 'civil action' " (Fed. R. Civ. P. 2), and state that "[a] civil action is commenced by filing a complaint with the court" (Fed. R. Civ. P. 3).

[8] The statutory definition of "civil action brought by or against the United States" does not specifically address this issue, stating only that the term "includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a dispute clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978" (28 U.S.C. 2412(d)(1)(E)). Appeals pursuant to the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, are actions brought in federal courts, not administrative proceedings. Under the Contract Disputes Act, a contractor may appeal the decision of a contractor directly to the United States Claims Court or, in certain limited cases, to a United States District Court. See 41 U.S.C. 609(a). In the alternative, the contractor may first seek review of the contracting officer's decision before an agency board of contract appeals and then appeal to the Federal Circuit or, in certain limited cases, to a United States District Court. 41 U.S.C. 607(g). In each case, the "appeal" entails an action in federal court, not an administrative proceeding. Administrative proceedings under the Contract Disputes Act are covered by EAJA only pursuant to an express statutory provision defining such proceedings as "adversary adjudications." See 5 U.S.C. 504(b)(1)(C)(ii).

United States Code."[9] Section 2412(d)(3) further requires the court in the "action" to include in the award fees and other expenses to the same extent the agency could have provided them under Section 504, unless the court finds the government's position was substantially justified "during such adversary adjudication."[10] Significantly, this Section makes no provision for the court to make an award of fees and expenses for representation in an agency proceeding that is *not* an adversary adjudication within the meaning of Section 504. The express provision directing the court to award fees for "adversary adjudications," combined with the absence of any provision for an award by the court of fees for agency proceedings that are not adversarial, strongly supports the conclusion that "a civil action" does not include proceedings on remand that are nonadversarial.

Thus, Section 2412 as a whole, and subsection 2412(d)(3) in particular, unequivocally demonstrate that the congressional objective was to provide for the award of EAJA fees only for work in connection with agency adjudications that are "adversary," as that term is defined in the statute, whether the award is made by the agency under 5 U.S.C. 504, or by a court under 28 U.S.C. 2412(d). There is no room in this statutory scheme for an interpretation of "civil action" that would sweep under the statute all agency proceedings that are conducted on judicial remand. Cf. *Stafford* v. *Briggs*, 444 U.S. 527,

[9] Or subject to the Contract Disputes Act of 1978, see note 8, *supra*.

[10] Similar distinctions between the "civil action" and the agency proceedings are at least implied in subsection 2412(d)(1)(B) (distinguishing between agency record and record in the "civil action") and in subsection 2412(d)(2)(D) (distinguishing between government position "in the civil action," and "the action or failure to act by the agency upon which the civil action is based").

535-536 (1980) (term "civil action" in 28 U.S.C. 1391(e) must be construed in light of underlying congressional objectives and the statutory scheme as a whole).[11]

There would be in addition a very difficult practical problem in attempting to apply Section 2412(d)(3) to a remand proceeding where, as here, the agency has taken no position. The prevailing party is entitled to an award of EAJA fees only if the government's position was not "substantially justified" (28 U.S.C. 2412(d)(1)(A)). Under Section 2412(d)(3), the court is to include in the fee an award for the administrative proceeding unless it concludes that "during such adversary adjudication the position of the United States was substantially justified." Therefore, in order to decide whether a claimant is entitled to fees for work performed before the agency on remand, the statute requires the court to determine whether the agency "position" in the remand proceedings was substantially justified.[12]

[11] See also *Pennsylvania* v. *Delaware Valley Citizens' Council For Clean Air Act*, 478 U.S. 546, 559 (1986). There, in light of the relevant legislative history where the terms "action" and "proceeding" were used interchangeably, the Court construed the fee-shifting provision of the Clean Air Act, 42 U.S.C. 7604(d), which provides for the award of fees in any "action" brought under the statute, as permitting the award of fees in both judicial and administrative proceedings. There is no similar legislative history in EAJA. Instead, as explained *infra*, the legislative history strongly supports the conclusion that *only* administrative adversary adjudications are covered by the Act.

[12] Other courts have recognized that EAJA requires a separate inquiry into whether the position of the United States was "substantially justified" at the particular adversarial stage of the case for which an attorney fee is sought. Cf. *Russell* v. *National Mediation Bd.*, 775 F.2d 1281, 1291 n.8 (5th Cir. 1985) (court must independently determine whether government's position in EAJA fee litigation was substantially justified before awarding additional fees for the fee litigation); *Rawlings* v. *Heckler*, 725 F.2d 1192, 1196 (9th Cir. 1984) (same); but see *Trichilo* v. *HHS*, 823 F.2d 702, 707-708 (2d Cir. 1987).

It is difficult if not impossible to imagine how such an inquiry would proceed with regard to Social Security remand hearings, because the agency has taken *no* position on remand.[13] Indeed, frequently (as here), changes in the applicable regulations or in the claimant's condition will have so substantially affected the claimant's situation that the issues that the agency adjudicators find dispositive on remand will bear little or no relation to the agency's position in the judicial proceeding. In fact, to the extent that an agency position on the remand can be discerned in this case it was that respondent was entitled to benefits.

Respondent nonetheless suggests (Br. in Opp. 9, 12) that Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), requires that remand proceedings be viewed as part of an ongoing civil action. Respondent asserts that since the reviewing court retains jurisdiction to review any decision rendered on remand,[14] the remand order does not

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[13] In this case, the court of appeals did not even attempt to identify the "position" of the agency on remand, but instead rested its holding on the agency's position in the judicial proceeding that led to the remand. That approach is, of course, quite inconsistent with the statutory direction that the court is to consider the government position "during such adversary adjudication," *i.e.*, before the agency. 28 U.S.C. 2412(d)(3).

[14] Section 205(g) of the Social Security Act provides in part as follows:

> the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decison shall be reviewable only to the extent provided for review of the original findings of fact and decision.

terminate the judicial action, and the proceedings on remand must therefore be treated as part of the civil action for purposes of EAJA.[15] But whether or not a decision remanding a case for further administrative action is "final" for purposes of Section 205(g), this provision has no bearing on whether Congress intended, under a quite different statute, enacted for unrelated purposes, to distinguish between judicial and administrative proceedings. As we have shown, the language and structure of

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[15] The courts of appeals have rejected an analogous contention in construing Section 206(b) of the Social Security Act, 42 U.S.C. 406(b), which provides:

> Whenever a court renders a judgment favorable to a [Social Security] claimant under this title who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation * * *.

The majority of courts of appeals have concluded that this provision only authorizes the courts to set fees for work performed for representation before the court; these decisions accordingly hold that the courts are without power to set a Section 206(b) fee for any work performed in administrative proceedings, including proceedings conducted pursuant to a remand from the courts. See, *e.g.*, *Gardner* v. *Menendez*, 373 F.2d 488 (1st Cir. 1967); *Conner* v. *Gardner*, 381 F.2d 497 (4th Cir. 1967); *Fenix* v. *Finch*, 436 F.2d 831 (8th Cir. 1971); *MacDonald* v. *Weinberger*, 512 F.2d 144 (9th Cir. 1975).

In *Webb* v. *Richardson*, 472 F.2d 529, 536 (1972), and *Rodriguez* v. *Bowen*, No. 86-1444 (Jan. 11, 1989), the Sixth Circuit has held that the tribunal that ultimately upholds the claim for benefits may set a fee for all attorney services rendered in the case. The court reasoned that this rule would protect litigants and their attorneys and further the interests of economy and efficiency. It did not, however, adopt the rationale urged by respondent here – that administrative proceedings on remand are to be viewed as part of the court proceedings. Indeed, on facts like those presented in this case, the Sixth Circuit's rule would not permit the court to set a Section 206(b) fee award at all. Rather, the agency, as the tribunal that ultimately upheld the benefit claim on remand, would have the sole authority to set fees under the Sixth Circuit's rule.

EAJA conclusively demonstrate that Congress intended to make just such a distinction for purposes of that statute.

C. The Legislative History Of EAJA Confirms That It Does Not Apply To Social Security Proceedings On Judical Remand

When it first enacted EAJA, Congress specifically recognized the non-adversarial character of Social Security administrative proceedings; it used such proceedings as the best example of ones that were not to be considered "adversary adjudications" for which an attorney fee award would be available. See H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23 (1980):

> [The statute] defines adversary adjudication as an agency adjudication defined under the Administrative Procedures Act where the agency takes a position through representation by counsel or otherwise. It is intended that this definition precludes an award in a situation where an agency, e.g. the Social Security Administration, does not take a position in the adjudication.

Before EAJA was reenacted in amended form in 1985 (see 28 U.S.C. 2412 note), appellate court precedent had unanimously recognized that the 1980 Act's definition of "adversary adjudication" flatly excluded Social Security administrative proceedings. *McGill* v. *HHS*, 712 F.2d 28, 30 (2d Cir. 1983), cert. denied, 465 U.S. 1068 (1984); *Miller* v. *United States*, 753 F.2d 270, 275 n.3 (3d Cir. 1985); *Guthrie* v. *Schweiker*, 718 F.2d 104, 107 (4th Cir. 1983); *Clifton* v. *Heckler*, 755 F.2d 1138, 1142-1143 (5th Cir. 1985); *Berman* v. *Schweiker*, 713 F.2d 1290, 1296 (7th Cir. 1983); *Cornella* v. *Schweiker*, 728 F.2d 978, 988-989 (8th Cir. 1984); *Wolverton* v. *Heckler*, 726 F.2d 580, 583 (9th Cir. 1984). None of these cases suggested that any different result would obtain if the agency adjudication was

pursuant to a judicial remand,[16] and in fact one of the them (*Cornella* v. *Schweiker*), involved just such an adjudication.[17]

When Congress reauthorized EAJA in 1985, it reenacted the same "adversary adjudication" language that the courts had universally construed as barring coverage of Social Security administrative proceedings.[18] The only amendment to the definition was to include proceedings before an agency's board of contract appeals. See Act of Aug. 5, 1985, Pub. L. No. 99-80, § 1, 99 Stat. 183-184, amending 5 U.S.C. 504(b)(1)(C). As this Court recently reaffirmed in *Pierce* v. *Underwood*, No. 86-1512 (June 27, 1988), slip op. 13, congressional reenactment of statutory language "of course, generally includes a settled judicial interpretation [of that language]. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978)."

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[16] Indeed, before the decision below, the only appellate suggestion that an EAJA award might be available for Social Security remand proceedings was a passing remark in *Baeder* v. *Heckler*, 826 F.2d 1345, 1347 (3d Cir. 1987).

[17] See 728 F.2d at 988. Despite the belief of the court below that *Cornella* was inapplicable to the 1985 reenactment of EAJA, the Eighth Circuit in *Kelly* v. *Bowen*, No. 87-1999 (Dec. 14, 1988), recently reaffirmed *Cornella*'s continuing validity under the current statute, disagreeing with the Eleventh Circuit's holding in this case. *Kelly* slip op. 7-8.

[18] The Secretary's regulations (48 Fed. Reg. 45,251 (1983)), as well as model EAJA rules promulgated by the Administrative Conference of the United States (46 Fed. Reg. 32,900, 32,912 (1981)), also made clear that adversary adjudications under EAJA were limited to proceedings in which the agency "is represented by an attorney or other representative * * * who enters an appearance and participates in the proceedings"—a definition that excludes Social Security administrative proceedings, whether conducted pursuant to a judical remand or not.

In any event, Congress could hardly have intended to work a profound change in EAJA's coverage through the single scrap of legislative history relied upon by the court below. Congress was clearly aware that covering Social Security administrative proceedings would greatly increase the number of EAJA fee awards. Indeed, when Congress first enacted EAJA in 1980, it expressly based its EAJA cost projections on the assumption that these proceedings would be excluded from EAJA's coverage. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 20, 22 (1980). A very substantial number of these proceedings are conducted pursuant to remands from the courts.[19] If Congress had intended to expand EAJA's waiver of sovereign immunity to this extent, it surely would have made that intention clear, presumably by a specific statutory amendment. It did not do so. Instead, the 1985 legislative history unmistakably evidences a congressional intent to preserve the settled judicial construction of the term "adversary adjudication" and to continue to exclude all Social Security administrative proceedings from EAJA's coverage.

In 1984, the Senate Judiciary Committee reported a bill that would have defined adversary adjudications as including "hearings pursuant to section 205 and section 1631 of the Social Security Act." S. Rep. No. 586, 98th Cong., 2d Sess. 1-2 (1984).[20] The House Judiciary Committee,

[19] The Social Security Administration's Office of Hearings and Appeals, for example, reports that in FY 1987 alone, SSA disposed of more than 10,000 cases on remand from the courts.

[20] Hearings conducted pursuant to Section 205(g) of the Social Security Act (42 U.S.C. 405(g)) and Section 1631(c)(3) of the Social Security Act (42 U.S.C. 1383(c)(3)) include, inter alia, administrative hearings conducted on remand from the courts.

however, considered and rejected a similar provision (130 Cong. Rec. H9301 (daily ed. Sept. 11, 1984) (remarks of Rep. Morrison)) and the provision was not included in the 1984 bill passed by Congress. See 130 Cong. Rec. S13,299 (daily ed. Oct. 3, 1984) (remarks of Sen. Heflin). After the President vetoed the 1984 EAJA reauthorization,[21] Congress took up the matter again in 1985. The 1985 legislation, however, included no provision similar to the one in the 1984 Senate bill; it instead continued to limit adversary adjudications to proceedings "in which the position of the United States is represented by counsel or otherwise". Act of Aug. 5, 1985, Pub. L. No. 99-80, § 1, 99 Stat. 183-184 (1985), amending 5 U.S.C. 504(b)(1)(C). The legislative history thus shows that Congress specifically rejected a proposal to extend EAJA to Social Security administrative proceedings, including those on remand. Even congressional proponents of the rejected proposals acknowledged that the 1985 legislation would not permit fee awards for any administrative hearings. Nor was there any suggestion that hearings on remand were an exception to the general rule.[22] Senator Heflin, for example, actively supported an amendment that would have extended EAJA to Social Security administrative proceedings. See 130 Cong. Rec. S13,299 (daily ed. Oct. 3, 1984) (remarks of Sen. Heflin). Nonetheless, in the floor debate on the 1985 legislation

[21] See President's Memorandum of Disapproval, 20 Weekly Comp. Pres. Doc. 1815 (Nov. 9, 1984).

[22] Remand proceedings are a significant part of the administrative process and involve large numbers of proceedings annually. It is thus hardly likely that legislators focusing on the extent to which EAJA should be applied to Social Security administrative proceedings intended to treat remand proceedings differently, but simply neglected, through oversight, to mention that intention.

ultimately enacted into law, Senator Heflin noted that "provisions covering proceedings under the Social Security Act, at the administrative hearing level are unable to be incorporated because of institutional opposition"; he therefore stated that, "While I believe this is an area ripe for protection, political realities dictate otherwise. And this seems to be a fight which will have to be fought another day." 131 Cong. Rec. 20,350 (1985) (remarks of Sen. Heflin).

The decision below completely ignored this legislative history. Instead, it focused on the single congressional statement that "If * * * the agency does take a position at some point in the adjudication, the adjudication would then become adversarial." H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 1, at 10 (1985). The court recognized (Pet. App. 14a n.8) that this statement is simply a quotation from the 1980 legislative history (compare H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 1, at 10 (1985) with H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23 (1980)). Nevertheless, the court read this language as requiring that *the 1985 Act* be read as providing that if the government has challenged the claimant's position in court, it must be deemed to have taken an adversarial position in any administrative proceedings that occur thereafter.[23]

Pierce v. *Underwood, supra*, is again instructive. The Court there rejected an argument, based on the same

[23] The court distinguished the consistent precedent holding that social security administrative proceedings are not covered by EAJA on the ground that they were decided under the 1980 statute (Pet. App. 14a n.8). It did not even attempt to explain why the simple quotation in the 1985 legislative history of a passage from the 1980 legislative history made decisions under the original statute dubious authority. As we explained above, the more logical conclusion is that congressional reenactment of the interpreted terms gives these decisions the added weight of legislative approval.

House Report, that the 1985 reenactment had changed the meaning of the statutory standard of "substantial justification." As the Court explained (slip op. 13), the 1985 House Report cannot be an authoritative expression of what the 1985 Congress intended,

> because it is not an explanation of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even in the legislative history of the 1985 reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation. (Quite obviously, reenacting precisely the same language would be a strange way to make a change.)

Exactly the same analysis should apply to the statutory language at issue here.

In any event, the snippet of legislative history upon which the court below relied supports its position only if read completely out of context.[24] In context, it is clear that

[24] Even in isolation, the statement only ambiguously supports the interpretation given it. The court necessarily read the term "adjudication" to include the entire course of judicial and administrative proceedings involved in the determination of a claim for Social Security benefits. As we have shown, however, the text and structure of the statute make perfectly clear that in the EAJA context, Congress carefully distinguished between judicial and administrative proceedings, and used the term "adjudication" to refer only to the administrative part of the overall process, while reserving the term "action" to refer to the judicial part of the process (see pp. 12-15, *supra*).

Moreover, the court's conclusion from this statement that the position of the United States in the judicial proceedings controls entitlement to fees at the administrative stage of the case simply cannot be reconciled with the statutory provisions requiring the court to analyze the government's justification in the judicial proceeding when con-

the 1985 report's allusion to instances in which the government takes a position in the adjudication refers, not to Social Security remand proceedings, but to a narrowly limited—and now discontinued—experimental program in which the Secretary was in fact represented by counsel in administrative proceedings.[25] As the cited report explains (H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 1, at 10 (1985)):

> While this language [defining adversary adjudication] generally excludes Social Security administrative hearings from the Act, Congress made clear in 1980 that "If * * * the agency does take a position at some point in the adjudication, the adjudication would then become adversarial," and thus be subject to the Act. It is the committee's understanding that the Secretary of Health and Human Services has implemented an experiment in five locations in which the Secretary is represented at the hearing before the administrative law judge. This is precisely the type of situation covered by section 504(b)(1)(C).

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sidering fees for that stage (28 U.S.C. 2412(d)(1)(A)), and to analyze its justification in the administrative proceeding when considering fees for that stage (28 U.S.C. 2412(d)(3)). See pp. 15-16, *supra*.

[25] The representation program is described in *Salling* v. *Bowen*, 641 F. Supp. 1046 (W.D. Va. 1986), vacated as moot, No. 86-2121 (4th Cir. June 15, 1987), a case in which the district court enjoined the continuation of the project (implemented in five of the approximately 140 hearings offices of the Social Security Office of Hearings and Appeals), principally on the ground that it violated statutory requirements that Social Security administrative proceedings be non-adversarial (641 F. Supp. at 1071-1073). In light of this opinion and experience with the project, the Secretary decided, after filing an appeal in *Salling*, to discontinue the project. Accordingly, on May 7, 1987, the Secretary revoked the project's authorizing regulations, thereby mooting the case. See 52 Fed. Reg. 17,286. There are now no administrative proceedings under Title II or Title XVI of the Social Security Act in which the Secretary, acting through an attorney or any other representative, enters an appearance before the administrative decisionmaker and takes a position on the claimant's entitlement to benefits.

That only Social Security proceedings conducted under this experimental program were to be covered by EAJA is confirmed by remarks of the Chairman of the House Ways and Means Committee, Rep. Rostenkowski (*Equal Access to Justice Act Amendments: Hearing on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 118 (1985)):

> It is true that the Equal Access to Justice Act has been extended to cover the five adversarial hearing experiments that SSA is currently undertaking, in which the government is represented at the ALJ hearing. The rationale for that extension was that, since the government was formally represented, claimants should not be unrepresented, and in such a setting, government payment for attorneys was appropriate. This rationale does not extend to the hearing process in general, either for initial applicants or for the beneficiaries appealing termination of benefits, because the process itself is not adversarial.

Significantly, Senator Heflin, who advocated covering Social Security administrative proceedings, also shared this view (131 Cong. Rec. 20,350 (1985)):

> Under the current provisions of the Equal Access to Justice Act, administrative proceedings where the Government is represented by counsel are covered. However, this provides limited coverage, such as the five pilot adversarial projects relating to social security claims implemented by the Secretary of Health and Human Services.

But this Court need not rely simply on negative implications from the legislative history; Congress expressly stated its intent to bar fees for work performed during administrative proceedings conducted pursuant to a remand from the courts. It explained (H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 1, at 19-20 (1985)):

> The court will usually decline to make an award upon the remand decision [in Social Security cases] because the remand order did not yet make the applicant a "prevailing party" and therefore eligible under the EAJA. * * * [T]he remand decision is not a "final judgment," nor is the agency decision after remand. Instead, the District Court should enter an order affirming, modifying, or reversing the final [agency] decision, and this will usually be the final judgment that starts the 30 days [for filing an EAJA petition, see 28 U.S.C. 2412(d)(1)(B)] running. * * * *As [the] courts have found[,] the only fees which will be available will be for those activities undertaken in connection with the initial [i.e., judicial] proceedings and not those associated with the administrative proceeding.* [Emphasis added.]

In sum, the legislative history of the 1985 EAJA, like that of the 1980 Act, unambiguously supports the conclusion that the *only* Social Security administrative proceedings covered by EAJA were those in the experimental representation program. Neither remand proceedings nor any other currently extant Social Security administrative proceedings are covered, for the simple reason that the government's position is not represented by counsel or otherwise.

The substantial administrative burden imposed on the agency by the court of appeals' contrary conclusion is simply inconsistent with congressional intent.

CONCLUSION

The judgment of the court of apppeals should be reversed.

Respectfully submitted.

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JANUARY 1989

APPENDIX

RICHARD J. EBBINGHOUSE
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June 27, 1986

The Office of Hearings & Appeals,
ATTN: Divisions of Civil Actions
P.O. Box 3300

RE: Social Security #419-56-3075

Dear Sirs:

I received the Administrative Law Judges [*sic*] recommendation of June 25, 1986. After reviewing the decision, it is apparent the Administrative Law Judge intended the sentence "[*sic*] the claimant to a period of disability commencing on May 15, 1982," to read May 15, 1981[.]

I have checked with the Administrative Law Judge's Office to verify this and this is a typographical error in his recommended decision portion and a correction will be issued revising his decision such that he states that the period of disability should commence on May 15, 1981.

I am writing to notify you of this impending revision, since the 20 day time period began running upon the date of the decision.

With the exception of this typographical error, the claimant is in agreement with the recommendation of the

Administrative Law Judge and respectfully requests that such a decision be entered by the Appeals Council.

Sincerely,

/s/ Richard J. Ebbinghouse
RICHARD J. EBBINGHOUSE

RJE/as
cc: Elmer Hudson

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RESPONDENT'S

BRIEF

QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in determining that hours worked by an attorney in a civil action pursuant to a limited remand by the district court were part of reasonable attorney fees as defined in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (Supp. IV 1986), § 2412(d)(2)(A) (Supp. IV 1986) ("EAJA").

2. Whether the court of appeals abused its discretion in determining that the portion of a Social Security proceeding initiated as a result of the district court's remand order, over the objection of the government agency that initially denied benefits to respondent without substantial justification, constitutes part of an "adversary proceeding" for which attorney fees may be awarded under the EAJA, 5 U.S.C. § 504(a)(1) (Supp. IV 1986), 28 U.S.C. § 2414(d)(3) (Supp. IV 1986).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-616

DON M. NEWMAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

ELMER HUDSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals is reported in *Hudson v. Secretary of Health and Human Services*, 839 F.2d 1453 (11th Cir. 1988). The opinion of the district court (Pet. App. 17a-20a)[1] is unreported.

JURISDICTION

Certiorari was granted on December 5, 1988. *Bowen v. Hudson*, 109 S. Ct. 527 (1988). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1982).

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[1] Appendix to Petition for Certiorari.

STATUTORY PROVISIONS INVOLVED

The Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412, provides in pertinent part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(A) (Supp. IV 1986).
>
> [T]he reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney's fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witness paid by the United States; and (ii) attorney's fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. 28 U.S.C. § 2412(d)(2)(A) (Supp. IV 1986).

The Social Security Act, provides, in pertinent part:

> The court . . . may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable [for support by substantial evidence]. 42 U.S.C. § 405(g) (1982).

STATEMENT

The issue in this case is whether the United States can be required to pay attorney fees under the Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412 (Supp. IV 1986) ("EAJA") for the services of a lawyer that became necessary when petitioner denied Social Security disability benefits to respondent for reasons that the court below found were not substantially justified.

On September 3, 1981, respondent Ms. Elmer Hudson filed a claim for Social Security and Supplemental Security Income disability benefits, stating that she became disabled on May 15, 1981 (Pet. App. 36a). At the time of her application, Ms. Hudson, who has a ninth grade education and intelligence in the low normal range (*id.* at 36a, 37a), suffered from obesity, chronic low back pain, chronic intermittent hypertension, a mild to moderate dysthymic disorder, and a histrionic personality disorder (*id.* at 36a). Until her impairments caused her to seek disability benefits, Ms. Hudson had spent her entire working life as a maid or janitorial worker.

After her disability claim and request for reconsideration were denied administratively, Ms. Hudson requested a hearing before an administrative law judge ("ALJ"). As a result of Ms. Hudson having cried uncontrollably throughout the hearing, the ALJ ordered that she be examined by a psychiatrist and a psychologist (*id.*). Following that examination, the ALJ found that Ms. Hudson suffered from the impairments previously noted.

Notwithstanding those findings, however, the ALJ denied benefits, reasoning that none of the impairments taken alone prevented Ms. Hudson from performing work similar to that which she previously had performed (*id.* at 37a). Despite clear legal precedent that impairments were to be considered not individually but in combination,[2] the Administrative Appeals Council approved the ALJ's decision and it became the decision of the Secretary of the Department of Health and Human Services ("HHS") (*id.* at 44a). Up to this point, Ms. Hudson had been represented by a paralegal employed by the local legal services program (*id.* at 36a).

After the Secretary denied her benefits, Ms. Hudson retained an attorney and appealed to the United States District Court for the Northern District of Alabama. The district court found that the Secretary's decision was supported by substantial evidence and affirmed the denial of benefits (*id.* at 43a-44a). The United States Court of Appeals for the Eleventh Circuit reversed, finding that the Secretary had failed to follow her own regulations, which required the Secretary to consider whether the combination of Ms. Hudson's impairments rendered her disabled. *Hudson v. Heckler*, 755 F.2d 781 (11th Cir. 1985) (per curiam). The court vacated the Secretary's decision and remanded the case for further proceedings.

On January 23, 1984, while her case was pending in the court of appeals, Ms. Hudson filed a new claim for disability benefits, for the period of disability beginning after the Secretary's denial of her first claim. That second claim was denied at the administrative level and she again requested a hearing before an ALJ. On February 23, 1985, the ALJ found Ms. Hudson disabled. The ALJ also found "good cause" to reopen her original claim then pending in the Eleventh Circuit. The ALJ purported to revise the Secretary's September 30, 1982,

[2] *See* cases cited in *Bowen v. Heckler*, 748 F.2d 629 (11th Cir. 1984), *e.g.*, *Reeves v. Heckler*, 734 F.2d 519 (11th Cir. 1984); *Strickland v. Harris*, 615 F.2d 1103 (5th Cir. 1980).

decision denying the first claim and to find that Ms. Hudson had been disabled since August 30, 1982 (*id.* at 18a, 30a, 31a).

When the court of appeals subsequently vacated the Secretary's 1982 decision denying benefits under her first claim, Ms. Hudson filed a motion in the district court seeking summary judgment on that first claim, based on the ALJ's decision on her second disability claim. The Secretary opposed summary judgment on the theory that there still remained a factual issue as to Ms. Hudson's disability during the fifteen-month period prior to the onset date of disability found by the ALJ presiding over her second claim. The district court denied the motion for summary judgment and remanded the case to the Secretary for further findings of fact (*see id.* at 30a-31a).

Following the district court's remand, the Appeals Council concluded that the ALJ hearing Ms. Hudson's second claim had not had jurisdiction to reopen the decision on her first claim and, pursuant to the court's direction, remanded that first claim to an administrative law judge for further proceedings (*id.*). In those remanded proceedings, Ms. Hudson continued to be represented by the lawyer who had succeeded in vacating the Secretary's original decision. Following a hearing, the ALJ found that Ms. Hudson had been disabled as of May 15, 1981, as she originally had claimed (*id.* at 24a-28a).[3] The Appeals Council adopted the ALJ's decision and Ms. Hudson was awarded benefits.

After the Secretary reversed herself on remand, Ms. Hudson filed a petition in the district court for attorney fees under the EAJA. The district court found that the Secretary's denial of disability benefits had been substantially justified and denied the petition for fees (*id.*

[3] When it was issued, the ALJ's decision erroneously indicated that Ms. Hudson's disability began on May 15, 1982; this error was identified and corrected through the efforts of Ms. Hudson's attorney (Pet. App. 29a).

at 17a-20a). The court of appeals reversed, finding that the district court had abused its discretion in view of the Secretary's failure to comply with her own regulations when she initially denied Ms. Hudson's disability claim. The court found that the Secretary's action had not been substantially justified and held that Ms. Hudson was entitled to fees for all work done by her attorney, including his representation of her at the administrative proceedings on remand.[4]

This Court granted certiorari to review that portion of the court of appeals' decision awarding attorney fees for the lawyer's representation of respondent on remand to the agency. Petitioner does not challenge the finding of the court of appeals that the Secretary's initial denial of benefits was not substantially justified.

SUMMARY OF ARGUMENT

The EAJA provides for an award of attorney fees to the prevailing party in proceedings against the government where the government's position is found not to have been substantially justified. The EAJA is divided into two parts. Each applies to a distinct type of proceeding. Title 5 U.S.C. § 504 provides for the award of fees by administrative agencies for work done in adversarial agency adjudications, and Title 28 U.S.C. § 2412(d)(1)(A) provides for the award of attorney fees in civil actions.

The Eleventh Circuit concluded that respondent, who ultimately secured benefits, qualified as a prevailing party, and that the government's position in opposing the grant of those benefits was not substantially justified. Petitioner does not contest either conclusion. Nor

[4] Ms. Hudson first sought attorney fees after the court of appeals vacated the decision denying benefits and remanded the case to the Secretary for further proceedings. The district court denied that petition as premature because Ms. Hudson was not yet a prevailing party within the meaning of the EAJA. 28 U.S.C. § 2412(d)(1)(A) (Record 17-18).

does petitioner contest the award made to respondent under the EAJA for that portion of the proceeding before the district court and court of appeals. Petitioner's limited challenge is to the Eleventh Circuit's award of fees for that portion of the administrative proceeding initiated by the district court's remand order, and conducted pursuant to the district court's continuing jurisdiction, through which respondent ultimately obtained her benefits and thereby qualified for fees as a prevailing party under the EAJA.

Petitioner's argument here rests upon an artificial bifurcation of the legal proceedings by which respondent obtained the benefits originally denied to her unlawfully. Petitioner concedes that the court action that led to the remand order was vigorously contested and that fees under the EAJA for respondent's representation there are appropriate. Petitioner nonetheless argues that the administrative remand ordered by the court, and over which the court retained jurisdiction, terminated the civil action and the adversarial relationship between the parties and put respondent's representation in that phase of the continuing proceeding beyond the scope of the EAJA. This argument rests on a constricted and erroneous interpretation of the language of the statute and, if adopted, would do violence to the Act's overriding purpose.

A district court's limited remand of a Social Security claim to the agency is simply a part of the continuing civil action. When a district court remands a Social Security case to HHS for factual findings, the Social Security Act provides that the district court retains jurisdiction.[5] Indeed an award of benefits is not final, and therefore attorney fees are not available, until the Secretary files his order with the district court, and the district court enters or modifies that order and dismisses the case. Thus, that portion of respondent's administrative

[5] Social Security Act, 42 U.S.C. § 301 *et seq.*, § 405(g) (1982).

proceeding conducted pursuant to the court's remand order and subject to the court's continuing jurisdiction, is an integral part of the "civil action" for which fees can be awarded under 28 U.S.C. § 2412(d)(1)(A).

Petitioner's attempt to divorce the limited administrative proceeding on remand from the continuing civil action that gave rise to the remand is unsupported by the plain language of either the EAJA or the Social Security Act. Reading "civil action" to include the proceeding on remand is consistent with the stated legislative purpose of the statute—to limit the disincentive to challenge unreasonable government action—and with the legislative history of the EAJA. Moreover, this common sense construction of the EAJA directly parallels other fee shifting statutes, under which fees generally are not available for non-adversarial administrative proceedings prior to the filing of a civil action, but are available for all subsequent proceedings necessary to prevail in the action as long as the district court has jurisdiction over that action.

In awarding fees for legal representation on remand, the Eleventh Circuit acted within its discretion. The district court and, derivatively, the court of appeals, has broad discretion to determine what constitutes reasonable legal services in a particular case. Here, where the claimant was mentally incapable of representing herself in the proceeding on remand, there is no question that the court below acted within its discretion in determining that legal representation on remand was reasonable and in fact necessary to obtain the benefits to which she was entitled. Petitioner does not seriously dispute the reasonableness of the attorney fees sought, they challenge only the context in which they were earned.

Even if petitioner's attempt to decouple the remanded administrative proceeding from the continuing civil action—and thereby deny respondent fees under 28 U.S.C. § 2412(d)(1)(A)—was well founded, respondent would

be entitled to attorney fees for the remand proceeding under the provision of the EAJA governing adversarial agency adjudications, 5 U.S.C. § 504(a)(1). Petitioner concedes that it opposed respondent's claim on the merits at every stage of the court proceedings, but argues that, for purposes of the EAJA, that adversarial posture automatically ceases on remand, unless the agency chooses to be represented by counsel. This attempt at compartmentalizing the government's litigation position—vigorously adversarial one day and completely neutral the next—comports neither with common sense nor with the purpose and history of the EAJA.

As the Eleventh Circuit correctly found, the legislative history of both the 1980 enactment and the 1985 amendment and extension of the EAJA clearly indicates that "[i]f . . . the agency does take a position *at some point* in the adjudication, the adjudication would then become adversarial." Petitioner's attempt to limit this reading of the statute by quoting out of context other sections of the legislative history is unavailing. Nothing in the statute or the legislative history supports the approach advocated by petitioner here, in which the government, for purposes of the EAJA, could engage in a shell game in which, as an adversary, it takes a position and makes factual arguments in court, on the very issues at stake in the subsequent remand, but then "withdraws" as an adversary by choosing not to be represented by counsel before the agency.

Petitioner argues that awarding attorney fees for time spent before the agency pursuant to a remand from the district court will open up the floodgates of Social Security litigation, and will place a substantial strain on the public fisc. This argument, however, ignores the simple fact that upholding the Eleventh Circuit's decision here will not increase *at all* the number of parties eligible for fees under the Act. It is settled law that fees generally are not available under the EAJA simply for winning a court remand. A claimant receives attorney fees only if

benefits ultimately are obtained. Respondent here was, as all potential parties affected by the Eleventh Circuit's decision would be, a prevailing party in a contested proceeding in which the government's position was not substantially justified. The Eleventh Circuit's ruling does not increase the potential pool of parties meeting these requirements; it simply affords them more complete compensation for overcoming an unjustified government position. Moreover, to the extent that the limited additional compensation flowing from the court of appeals' decision will encourage parties to pursue meritorious claims, that result simply furthers the fundamental purpose of the EAJA.[6]

Conversely, the approach urged by petitioner would *not* limit in any way the number of *eligible claimants* under the EAJA, but rather would discourage eligible claimants—parties with valid claims for benefits frustrated by unjustified government opposition—from pursuing those claims by denying them compensated representation with which to overcome that opposition. No result could more clearly violate the letter and spirit of the EAJA.

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[6] In 1985, only about 3.5% of the prevailing parties sought fees under EAJA, and the average EAJA award was small ($5,600 in 1984). House Supplemental Report No. 120, Part II, 99th Cong., 1st Sess. 2-3, *reprinted in* 1985 U.S. Code Cong. & Admin. News 151, 152-53 (hereinafter "1985 House Supplemental Report"). Therefore, the Eleventh Circuit approach will not substantially increase the liability of the government for fees under the EAJA.

ARGUMENT

I. TITLE 28 U.S.C. § 2412(d)(1)(A) ALLOWS THE AWARD OF ATTORNEY FEES FOR LEGAL SERVICES PROVIDED IN ADMINISTRATIVE PROCEEDINGS CONDUCTED PURSUANT TO A LIMITED REMAND FROM DISTRICT COURT.

Respondent obtained the Social Security and Supplemental Security Income disability benefits to which she was lawfully entitled only after prevailing over petitioner's unjustified opposition. To assist in overturning this unlawful denial of benefits, respondent, who is borderline mentally retarded, required the services of an attorney. Respondent then filed a petition under the EAJA to obtain fees for the work performed by her lawyer. After careful review of the fee petition, the court of appeals ordered petitioner to pay respondent's attorney fees for the work necessary to obtain respondent's benefits, including work done as a result of the court's remand of respondent's claim to the agency for further proceedings. In all respects, the court of appeals' award of fees comported with the plain language and intent of the EAJA.

A. The Fees in This Case Were Properly Awarded in a Civil Action Pursuant to 28 U.S.C. § 2412(d)(1)(A).

Congress enacted the EAJA in two parts: the first part of the statute appears as part of the Administrative Procedure Act, in Title 5 of the United States Code; the second part appears in the United States Code of Judicial Procedure, in Title 28. The two code sections are designed to complement each other, but govern the award of fees in two distinct circumstances. Title 5 U.S.C. § 504 governs the award of fees by agencies themselves for legal services provided in formal administrative adjudications. Title 28 U.S.C. § 2412 governs the award of fees in civil actions initiated in federal court. Under the plain meaning of the EAJA, supported by its legislative history, remands in Social Security cases from

district court to the Department of Health and Human Services are part of the civil action in district court and are covered by 28 U.S.C. § 2412(d)(1)(A).

1. ***The Limited Remand in This Case Was Part of the Civil Action.***

An examination of the relationship between the EAJA and the Social Security Act remand provisions supports the conclusion that the EAJA permits the award of fees for representation following a limited remand to the agency.

a. *Title 28 U.S.C. § 2412(d)(1)(A) Provides for an Award of Fees in Civil Actions.*

Title 28 U.S.C. § 2412(d)(1)(A) states:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . *in any civil action . . . including proceedings for judicial review of agency action, brought* by or against the United States *in any court having jurisdiction of that action*, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Id. (emphasis added). Thus, in any proceeding over which the court "ha[s] jurisdiction," it may award a reasonable attorney fee under the EAJA if the plaintiff ultimately prevails on the merits, and the court finds that the agency's position was not substantially justified. Awards under 28 U.S.C. § 2412(d)(1)(A) are distinct from those made in agency proceedings under 5 U.S.C. § 504.[7]

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[7] Awards made under 28 U.S.C. § 2412(d)(1)(A) are also wholly unaffected by the provisions at 28 U.S.C. § 2412(d)(3). *See infra* at page 22. The latter provision is intended to permit a court on review of an adversarial agency proceeding to award fees for services provided at the agency level *prior to* judicial review after the court finally disposes of the matter. If the adversarial proceeding terminates prior to judicial review, the fees for the legal services

b. *Title 42 U.S.C. § 405(g) Renders a Limited Remand From the District Court Part of the Civil Action.*

Title 28 U.S.C. § 2412(d)(1)(A) by its terms applies to "civil actions." There is no question that the proceedings on remand in this case were part of the civil action in which the remand order was issued. Indeed, the Social Security Act explicitly treats remands in this manner. First, 42 U.S.C. § 405(g) authorizes the district court to review agency decisions:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action . . . .

Id. The statute emphasizes that the district court is to make the final decision on the claimant's entitlement to benefits, and may do so without remand if there are sufficient facts in the record.[8]

However, section 405(g) also recognizes that in some cases the record may be inadequate to permit a final decision without further proceedings. In those situations, the statute provides for a remand to the agency:

> The court . . . may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of

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before the agency would be awarded by the agency under 5 U.S.C. § 504. Title 28 U.S.C. § 2412(d)(3) permits the court to award fees for both portions of the work; it has no relevance in cases such as this that do not involve a request for fees for work done prior to judicial review.

[8] "The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary . . . ." 42 U.S.C. § 405(g).

> fact or his decision, or both, *and shall file with the court any such additional and modified findings of fact* and decision, *and a transcript* of the additional record and testimony upon which his action in modifying or affirming was based. *Such additional or modified findings of fact and decision shall be reviewable* [*for support by substantial evidence*].

Id. (emphasis added).

Relying on section 405(g) of the Social Security Act, courts consistently have held: (1) that there is no final order for EAJA purposes until the district court has either modified or affirmed the decision of the Secretary on remand;[9] and (2) that the thirty day period for submission of an EAJA petition does not begin to run until after the order following remand has become final.[10] Therefore, no fees are available for any proceeding until there is a final order awarding benefits.

The remand in this case was made pursuant to section 405(g) after petitioner argued in opposition to respondent's motion for summary judgment that a factual issue remained to be determined as to whether respondent had established her disability for a fifteen-month period. When the remand provisions of the Social Security Act are read in conjunction with the language of the EAJA, and cases interpreting that language, it is clear that the remand in this case was a continuation of the civil action, and cannot be bifurcated as petitioner seeks to do.

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[9] *Brown v. Secretary of Health and Human Services*, 747 F.2d 878 (3d Cir. 1984); *Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir. 1983). *See McGill v. Secretary of Health and Human Services*, 712 F.2d 28 (2d Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984). However, the *Brown* court noted that the court retains its full equity power to award fees for bad faith, or under an equitable trust, and need not always wait for an agency decision where that would be inappropriate. *See, e.g., MacDonald v. Schweiker*, 553 F. Supp. 536 (E.D.N.Y. 1982).

[10] *Taylor v. Heckler*, 778 F.2d 674 (11th Cir. 1985); *Guthrie*, 718 F.2d at 106; *Brown*, 747 F.2d at 878.

2. *The Court of Appeals Acted Within Its Discretion in Determining That Hours Worked on Remand Were Necessary to Achieve the Results Sought in the Litigation.*

Under the EAJA, respondent became entitled to attorney fees only after she prevailed in her effort to obtain disability benefits,[11] and the court of appeals found that petitioner's denial of benefits was without substantial justification. The court of appeals then had to determine what fees were reasonable. The court concluded that the reasonable services of respondent's attorney included the representation in the remand proceedings before the agency. The court's determination of what constituted a reasonable attorney fee comports with the EAJA and is consistent with the award of attorney fees under other fee shifting statutes.

For purposes of § 2412(d)(1)(A) "fees and other expenses" include:

> [T]he reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney's fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witness paid by the United States; and (ii) attorney's fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.).

28 U.S.C. § 2412(d)(2)(A). Respondent filed a detailed petition for fees under this provision, setting forth the

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[11] *See* cases cited at note 9. The district court's decision is reviewable only for abuse of discretion. *Pierce v. Underwood*, 108 S.Ct. 2541, 2553 (1988).

specific services provided by her attorney and the time spent in the representation. In some instances, petitioner challenged whether particular services were warranted or whether the amount of time spent was justified. One such challenge was to the services of respondent's attorney in the proceedings on remand. As it was required to do, the court of appeals reviewed the petition for fees and petitioner's opposition to the petition and made a determination of what services had been reasonable. On that basis, the court concluded that respondent should be awarded a fee for the services of her attorney in the remand proceedings.

The procedure followed by the court of appeals under the EAJA is consistent with the procedure followed by this Court under other fee shifting statutes. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), this Court outlined the procedure for determining what constitutes a reasonable fee under the Civil Rights Attorney's Fees Act:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.
>
> The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." . . . Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority."

Id. at 433-34 (citations omitted) (emphasis in original). The guidelines set forth in *Hensley* for determining a reasonable fee are virtually identical to those followed by the court below in awarding the fees in this case.

This Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 559 (1986), also supports the manner in which the fee in this case was determined. In *Delaware Valley*, an attorney who had obtained a consent decree in court under the Clean Air Act, sought fees for time subsequently spent participating in notice and comment rulemaking proceedings. The proposed regulations would have had an impact on the agency's obligations under the consent decree. The Court concluded that even though attorney fees under the Clean Air Act were limited to representation in "actions" and the notice and comment proceedings were not technically part of the legal action, the efforts of the lawyer were "reasonably necessary to accomplish the goal of the litigation," and fees therefore were available.[12] In the present

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[12] *Delaware Valley*, 478 U.S. at 559-60. Petitioner argues that this case is inapposite because the Clean Air Act uses the word "action," instead of "civil action." This argument is to no avail. On the contrary in *Delaware Valley*, this Court took note of *Webb v. Dyer County Board of Education*, 471 U.S. 234, 243 (1985) (time spent on optional administrative proceedings is compensable if the work was "both useful and of a type ordinarily necessary to advance the litigation), and determined that there was no distinction between the term "action" in the Clean Air Act, and the term "action or proceeding" in the Civil Rights Attorney's Fees Act, because the purposes of the two statutes were identical. "Section 1988 was enacted to insure that private 'citizens have a meaningful opportunity to vindicate their rights protected by the Civil Rights Acts. . . . § 304 authorizes private citizens to sue any person violating the Clean Air Act . . . specifically to encourage

case, there is no question that success in the proceeding on remand was necessary to obtain benefits, and the government does not challenge the rationality of counsel's decision to help Ms. Hudson in the procedeing before the ALJ.

In addition to stating a broad standard, the Court in *Delaware Valley* recognized that the district court has broad discretion to determine what constitutes a reasonable fee, stating that the standard for review of an award of fees was abuse of discretion, and finding the district court's action in that case was well within its "zone of discretion." 478 U.S. at 561. In *Pierce v. Underwood*, 108 S. Ct. 2541, 2553 (1988), this Court specifically endorsed this approach for reviewing fee awards under EAJA, stating that "[under EAJA] it is well established that the abuse-of-discretion standard applies." *Id.* (citing *Hensley* and *Delaware Valley*).

The facts of this case are even stronger than those of *Delaware Valley*. In *Delaware Valley*, the plaintiffs did not need to participate in the notice and comment proceeding. They could have waited for the agency to act and, if the regulations adopted conflicted with the consent decree, simply sued to enforce the decree. Their rights would not have been permanently impaired if the agency had acted without their participation. Nonetheless, the court awarded fees. In this case, respondent had no such option. Either respondent would receive benefits as a result of the remand, or she would not. Prevailing in the civil action, and therefore obtaining Social Security benefits in this case, depended entirely upon respondent

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citizen participation in the enforcement of standards and regulations established under this Act.'" *Id.*

As we demonstrate below, *infra* at 23-24, the primary purpose of EAJA is to relieve citizens of the financial burden of challenging unreasonable government action. It would be contrary to that fundamental purpose if fees were available for only part of the task. The same principles that apply in other fee shifting cases should apply in EAJA cases.

succeeding in the remand proceedings. The court below was in the best position to determine if the services provided by respondent's attorney were "reasonably necessary to accomplish the goal of litigation."

Petitioner does not dispute that the efforts of respondent's lawyer in the remand proceedings were reasonably necessary to prevail on respondent's claim for benefits. Instead, petitioner argues that the EAJA in all circumstances prohibits the award of fees for representation in administrative proceedings on remand by order of the court. Nothing in the Act or its legislative history supports that conclusion.

B. No Other Provision of the EAJA Prohibits the Award of Attorney Fees for Legal Services Provided in Proceedings Pursuant to a Judicial Remand.

Petitioner makes two statutory arguments in support of the contention that 28 U.S.C. § 2412(d)(1)(A) requires a court to make a distinction between legal representation leading to a remand and legal representation in the proceedings on remand. Petitioner argues (1) that 5 U.S.C. § 504 specifically excludes non-adversarial Social Security proceedings from coverage under the EAJA, and (2) suggests that 28 U.S.C. § 2412(d)(3) governs the award of fees in this case. The first argument is true but irrelevant because the fees awarded here were not under 5 U.S.C. § 504; the second argument is demonstrably false.

1. *Neither Title 5 U.S.C. § 504(a)(1) nor Title 28 U.S.C. § 2412(d)(3) Limits the Award of Attorney Fees Under 28 U.S.C. § 2412(d)(1)(A).*

Petitioner's position is based primarily on the decision of the Eighth Circuit in *Cornella v. Schweiker*, 728 F.2d 978 (8th Cir. 1984). In that decision, with virtually no analysis, the court held that attorney fees are not available for work done by a lawyer in remand proceedings involving Social Security benefits. The Eighth Circuit's

decision relies entirely upon cases which were addressing whether legal fees would be available simply for winning a remand, and arose in a posture where the only fees accrued for legal representation in Social Security proceedings were those for work done prior to the action for judicial review.[13]

However, none of these cases dealt with fees for work on remand. *Cornella* therefore provides no guidance for deciding whether Title 28 U.S.C. § 2412(d)(1)(A) permits the award of fees made in this case.[14] Moreover, its interpretation of the applicability of Title 5 U.S.C. § 504 to proceedings on remand cannot be squared with the plain language of the EAJA or its legislative purpose.[15]

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[13] *See, e.g., Guthrie*, 718 F.2d at 108 ("we reiterate, however, that fees cannot be allowed for services rendered in the administrative proceedings"); *Berman v. Schweiker*, 713 F.2d 1290, 1296 (7th Cir. 1983); *McGill*, 712 F.2d at 30 ("Although Social Security administrative proceedings, which are not adversary adjudications, are excluded from EAJA coverage . . . the statute has been found applicable to judicial review actions brought under the Social Security Act.").

[14] Indeed one later case in this line recognized that the remand to the agency,

> is in some ways analogous to the 'limited or controlled' remand employed by the courts of appeals. *See* 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure* ¶ 3937 (1977). In that context the appella[te] court remands a matter to the district court for further fact finding or clarification, but retains jurisdiction of the case.

Brown, 747 F.2d at 885 n.8.

[15] *Cornella* dealt with the EAJA as enacted in 1980, not as reenacted in 1985. In *Kelly v. Bowen*, 862 F.2d 1333 (8th Cir. 1988), decided after this case below, the Eighth Circuit reexamined its position in *Cornella*, in light of the Eleventh Circuit's opinion in this case. The court concluded that the determinative factor in whether a proceeding became adversary was whether the United States was represented by counsel, and that fees were not available where no counsel was present in the remand proceeding.

This conclusion is inapposite for two reasons. First, as we discuss below, the limitation of section 504 to adversary proceedings does not apply once the district court has jurisdiction. Second, the position of the United States has consistently been represented by counsel in this proceeding, and the United States took positions on the facts in the record of the 1982 hearing which were in issue on remand. Though counsel did not choose to make an appearance on remand, the position of the United States had been registered on the record, by counsel, and was available to the ALJ.

a. *Title 5 U.S.C. § 504.*

In addition to Title 28 U.S.C. § 2412(d)(1)(A), which authorizes courts to award attorney fees in civil actions, the EAJA also authorizes agencies to award fees in adversarial proceedings under the Administrative Procedure Act. 5 U.S.C. § 504. The authority under section 504 is similar but not identical to the authority under 28 U.S.C. § 2412(d)(1)(A). Title 5 U.S.C. § 504 (a)(1) provides in pertinent part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

The term "adversary adjudication" is defined as:

> an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . .

5 U.S.C. § 504(b)(1)(C).

Section 504(a)(1) permits the award of attorney fees for work done by attorneys prior to judicial review in agency proceedings that are adversarial. This provision, however, has nothing to do with cases in which fees are awarded for work ancillary to a civil action; nor does this provision in any way limit the authority of a court to award fees in such actions.

b. *Title 28 U.S.C. § 2412(d)(3).*

Petitioner argues that 28 U.S.C. § 2412(d)(3) somehow imports the limitation of 5 U.S.C. § 504 to actions for fees under section 2412(d)(1)(A). This construction misreads the limited purpose of section 2412(d)(3).

Section 2412(d)(3) provides that:

> In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code . . . the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

This provision has no bearing whatsoever on the availability of fees under 28 U.S.C. § 2412(d)(1)(A) in civil actions that did not involve adversarial proceedings prior to judicial review. It merely permits courts at the conclusion of certain civil actions to award attorney fees for legal services provided in adversarial agency proceedings that did occur prior to judicial review. This provision does not address in any way the award of fees in cases that were *non-adversarial* prior to initiation of a civil action. Its primary purpose is to permit the recovery of fees otherwise available under 5 U.S.C. § 504 when the adversarial administrative proceeding is terminated upon judicial review.[16]

[16] With the exception of the exclusion of fees for non-adversary proceedings prior to judicial review, this statutory approach is broader than that followed under other attorney fees statutes, such as the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988, where fees for proceedings before agencies are not automatically available. *Webb v. Dyer County Board of Education*, 471 U.S. 234, 242-43 (1985).

[Continued]

2. *The Award of Fees in This Case Is Consistent With the Legislative Purpose of the EAJA.*

When the Congress enacted the EAJA in 1980, it clearly set forth in the legislative findings the purpose of the statute:

> (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.
>
> . . .
>
> (c) *It is the purpose of this title . . .*
>
> (1) *to diminish the deterrent effect of seeking review of, or defending against, governmental action* by providing in specified situations an award of attorney's fees, expert witness fees, and other costs against the United States; and
>
> (2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the 'American rule' respecting the award of attorney's fees.

[16] [Continued]

That section 2412(d)(3) applies only to fees for the initial agency proceeding is made clear by the existence of a mirror image provision in the APA, 5 U.S.C. § 504(a)(2), which provides:

> When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

This provision holds in abeyance the award of fees in adversarial proceedings under the Administrative Procedure Act where the agency's action has not been reviewed in court. Section 2412(d)(3) then permits the court to award the fees that were held in abeyance thereby.

Pub. L. No. 96-481, 1980 Sec. 202(a)-(c), 94 Stat. 2325 (1980) (emphasis added). Thus the primary purpose of the statute was to remove the high cost of legal services as a disincentive to challenging unreasonable government action. This purpose was reiterated when the statute was reenacted in 1985. H.R. Rep. No. 120, 99th Cong., 1st Sess., *reprinted in* 1985 U.S. Code Cong. & Admin. News 132 (hereinafter "1985 House Report").

Respondent concedes that Title 5 U.S.C. § 504 does not permit the recovery of fees in initial agency proceedings that are not adversarial. It is crucial, however, to read this provision in a manner that is consistent with the plain language of the statute and with the legislative purpose. When that is done, it is obvious that reading Title 5 U.S.C. § 504 into Title 28 U.S.C. § 2412(d)(1)(A) in this case would be inconsistent with the purpose of the EAJA.

A claimant for Social Security disability benefits, such as respondent, is entitled to attorney fees under the EAJA only when he or she successfully obtains benefits over the unjustified opposition of the Secretary. In this case, that required further proceedings on remand after respondent succeeded in getting petitioner's initial denial of benefits overturned in the civil action filed on her behalf.

Under petitioner's reading of the statute, respondent could have retained a lawyer to assist her to obtain the remand but not actually to obtain her disability benefits if it required going back to the agency for further proceedings. Worse yet, the attorney would be expected to stand by as the claimant proceeded on remand without a lawyer, and thereby risk having the claimant denied benefits, or undertake the representation on remand without compensation under the EAJA. Having to pursue either course of action would create powerful disincentives to challenging unreasonable government action or providing representation under the EAJA.[17]

3. *Respondent's Interpretation of the EAJA Is Consistent With the Approach Followed Under Other Fee Shifting Statutes.*

Respondent's reading of the EAJA is consistent with how courts have applied other fee shifting statutes that distinguish between civil actions and agency proceedings. Under these fee shifting statutes, no express provision is made for representation by lawyers in proceedings before agencies. As a result, courts have determined on a case-by-case basis whether fees are available for administrative proceedings. In *Webb v. Dyer County Board of Education*, 471 U.S. 234 (1985), for example, this Court held that, under the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988 (1982) fees were not automatically available for participation in administrative proceedings prior to actually filing suit, but recognized that fees for such work might be available if the work was reasonably calculated to lead to success in the civil case.

In the EAJA, the Congress statutorily established standards for the award of fees for work done in administrative proceedings *prior to* the filing of a civil action. Thus, Congress determined that fees would not be available for participation in non-adversarial proceedings because the government did not have an interest that was sufficiently concrete; on the other hand, Congress decided that fees would be available for legal representation in agency adjudications in which the government participated as a party or otherwise took a position.

[17] In this case, the Eleventh Circuit reached the result compelled by the plain language of the statute. It did so, however, without recognizing that the statute firmly distinguishes between civil actions and actions before the agency. The court reached the proper result because it focused on unambiguous language in the legislative history to clarify what it otherwise saw as ambiguous language in the statute. As discussed above, the language is not ambiguous when carefully parsed.

By contrast, where fees are awarded under the fee shifting statutes for legal work done *after* the civil action is filed, such fees generally are available for all work that was necessary to achieve the goal of the litigation, whether it was directly in the court proceeding or not. That approach was followed by this Court under the Clean Air Act, § 304(d), 42 U.S.C. § 7604(d) (1982). Thus, in *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546 (1986), this Court held that work done in optional notice and comment rulemaking proceedings that was "useful and ordinarily necessary" to enforce a consent decree was work in the civil "action" and fees were recoverable. This approach is consistent with the language and purpose of the EAJA and with the result reached in the court below.

4. *The Legislative History Supports Respondent's Interpretation of the EAJA.*

In addition to the stated legislative purpose set forth in the EAJA, which petitioner ignores, key passages in the legislative history also support respondent's reading of Title 28 U.S.C. § 2412(d)(1)(A). Petitioner cites to several of these out of context (one by simply leaving out the portion that belies its position, and another because petitioner ignores a subsequent legislative correction of a typographical error). When properly read, in light of the plain language of the EAJA and the legislative purpose, the legislative history supports the result reached in the court below.

a. *The 1980 Enactment of the EAJA.*

The original bills to enact the EAJA would have extended its coverage to all formal agency adjudications. During debate it was pointed out that these bills would have made fees available for non-adversarial Social Security hearings, which accounted for approximately 90% of the cases in which judicial review of agency action is sought. The cost of providing fees in all such cases

proved to be a legislative road block. In order to make the statute financially acceptable, the Senate amended its version of the bill.[18] Rather than simply excluding all Social Security proceedings, however, the Senate took an approach that was consistent with its broader purpose. Thus, the Senate added a provision which limited the availability of fees to administrative proceedings involving "adversary adjudication."

This limitation served two purposes. First it saved money. Second, Representative Kastenmeier noted, the "adversary adjudication" provision also was fair—because the government should not be liable for fees in proceedings where it was not represented by counsel, and did not affirmatively take a position.[19] As the Conference Report stated, one clear effect of the limitation was to exclude some Social Security hearings from coverage. However, the intent of Congress was that this exclusion extend only to those proceedings where the broader purpose of the statute would not be served by awarding fees.

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[18] "The section covers only adversary adjudications under 554 of title 5 and not rulemaking or other administrative proceedings. In part the decision to award fees only in adversary adjudications reflects a desire to narrow the scope of the bill to make its costs acceptable. It also reflects a desire to limit the award of fees to situations where participants have a concrete interest at stake but nevertheless may be deterred from asserting or defending that interest because of the time and expense involved in pursuing administrative remedies." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 14, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4984, 4992-93.

[19] "[W]e have limited the administrative proceedings which are covered in this bill to 'adversary adjudications.' Adversary adjudications are defined in this bill as those adjudications under section 554 of the Administrative Procedure Act in which the position of the United States is represented by counsel or otherwise. Elemental fairness requires that if the United States is to be liable for attorneys fees, it should be represented in such proceedings." 126 Cong. Rec. H10223, 96th Cong., 2d Sess. (daily ed. Oct. 1, 1980) (statement of Rep. Kastenmeier).

The Conference Report states:

> The conference substitute defines adversary adjudication as an agency adjudication defined under the Administrative Procedure Act where the agency takes a position through representation by counsel or otherwise. It is intended that this definition precludes an award in a situation where an agency, e.g., the Social Security Administration, does not take a position in the adjudication. If, *however, the agency does take a position at some point in the adjudication, the adjudication would then become adversarial.*

H.R. Rep. No. 1434, 96th Cong., 2d Sess. 23 (1980) (emphasis added).

The House Report is even more instructive:

> There was much discussion whether the United States should be liable when it is a named party and represented in a civil action under the Social Security Act. The Committee decided that civil actions should be covered.

H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4984, 4991. Congress unmistakably intended to eliminate most Social Security hearings from coverage under the EAJA, but not after a claim for benefits became adversarial—once it became part of a civil action. This distinction is confirmed by debate on the House floor prior to final passage of the bill:

> MR. ROSTENKOWSKI. But as I read the language adopted by the Senate and the language that is presently before us, there is no exemption for social security cases in this language.
>
> MR. RAILSBACK. All right, if the gentleman would yield. I think the gentleman is wrong. . . [I]n the conference they adopted the language of the Committee on the Judiciary bill which I say to my friend from Illinois would rather drastically limit recovery only to actions where they went into Federal district court. . . .

126 Cong. Rec. H10220, 96th Cong., 2d Sess. (daily ed. Oct. 1, 1980). This legislative history from 1980 makes it clear that Congress expected that fees would be awarded in Social Security cases once those cases reach the district court.

b. *The 1985 Reenactment of the EAJA.*

When the EAJA was reenacted in 1985, the Congress maintained the distinction between adversary and non-adversary agency adjudications. The House Report reiterated, however, that if the government does take a position in a proceeding, the proceeding becomes adversarial:

> As enacted in 1980, the Act covers "adversary adjudications"—i.e., an adjudication under section 554 of title 5, United States Code "in which the position of the United States is *represented by counsel* or otherwise" (emphasis added). (*See* section 504(b)(1)(C) of title 5, United States Code). While this language generally excludes Social Security administrative hearings from the Act, Congress made clear in 1980 that "If . . . the agency does take a position at some point in the adjudication, the adjudication would then become adversarial," and thus be subject to the Act.

To make its point, the report cited a specific example of when fees would be appropriate in an otherwise non-adversarial proceeding in which the government at some point took a position:

> It is the committee's understanding that the Secretary of Health and Human Services has implemented an experiment in five locations in which the Secretary is represented at the hearing before the administrative law judge. This is precisely the type of situation covered by section 504(b)(1)(C). While generally, Social Security administrative hearings remain outside the scope of this statute, those in which the Secretary is represented are covered by the Act. If awards are made in these adversarial

> experiments, government representation projects, or pilot projects, as they are sometimes described, the source of the funds would never be the trust fund, but rather would be the Social Security Administration's own budget or the U.S. Treasury.

1985 House Report at 10, U.S. Code Cong. & Admin. News at 138.

Petitioner argues that this 1985 reiteration of the language from the 1980 legislative history somehow limits the instances in which fees might be available in Social Security cases to the experimental program discussed in the 1985 House Report. Read in context, however, it is obvious that the experimental program is cited only as an example of the kind of proceeding in which fees would be available. The 1985 report in no way limits the 1980 language which contains no reference to the experimental program, and in fact the report cites that language with approval.

In addition, when Congress reenacted the EAJA in 1985, it also discussed the awarding of fees in Social Security cases at the point that a remand is ordered, but prior to the proceedings on remand:

> The court will usually decline to make an award upon the remand decision because the remand order did not yet make the applicant a "prevailing party" and therefore eligible under the EAJA. But see, *MacDonald v. Schweiker*, 553 F. Supp. 536 (E.D.N.Y. 1982). In *Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir. 1983), the Court pointed to the provision of 42 U.S.C. 405(g) providing that after the HHS review upon remand the agency must file its finding with the reviewing court. Thus the remand decision is not a "final judgment," nor is the agency decision after remand. Instead, the District Court should enter an order affirming, modifying, or reversing the final HHS decision, and this will usually be the final judgment that starts the 30 days running. See also, *Brown v. Secretary of Health and Human Services*, 747 F.2d 878 (3rd Cir. 1984). In addition, as the *Brown* court points out, the remanding courts are vested with full equity powers and need not simply wait for the agency to act if that would be inappropriate. *Brown* at 885. As these courts have found the only fees which will be available will be for those activities undertaken in connection with the judicial proceedings and not those associated with the administrative proceeding.

1985 House Report at 19-20, U.S. Code Cong. & Admin. News at 148. This passage reflects three things: (1) that Congress was cognizant of the fact that a court retains jurisdiction of a Social Security case even after it is remanded to the agency; (2) although petitioner argues that this passage specifically states that no fees are available on remand, when the passage is read as a whole, the meaning is far more narrow—that fees generally will not be available simply for winning a remand;[20] and (3) because Congress used the word "usually" this suggests that sometimes fees *will* be available simply for winning a remand.[21]

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[20] Petitioner argues that this passage in the legislative history is dispositive. However, petitioner's analysis of this language relies upon a typographical error. Petitioner's analysis is based upon the following quote "[t]he only fees which will be available will be for those activities undertaken in connection with the initial [*i.e.* judicial] proceedings and not those associated with the administrative proceeding." The presence of the word "initial" suggests that fees for work in a proceeding on remand will be denied. However, the technical correction to the House Report changed the word "initial" to the word "judicial." 1985 House Supplemental Report, U.S. Code Cong. & Admin. News at 157. As such, the passage says only that the courts in the cases cited in *Brown* relied upon their inherent authority to award fees for obtaining a remand before final resolution, but that the fees were only for work in the judicial proceeding and not the prior agency proceeding. That result does not in any way advance petitioner's interpretation of Title 28 U.S.C. § 2412(d)(1)(A).

[21] Petitioner cites to the Congressional Budget Office Cost Estimate, and notes that the estimate excluded all Society Security pro-

During the debate in the House Subcommittee on the Judiciary, Representative Morrison presented an amendment that would have allowed for fees simply for obtaining a remand to the agency. This proposed amendment was rejected. Again, petitioner argues that this rejected amendment speaks to this case. It does not. The proposed amendment dealt only with the issue of whether a party was a "prevailing" party in a Social Security case simply for winning a remand. As is discussed above, rejection of this amendment cuts the other way. Because fees are not available until there is actually a decision awarding benefits, it is obvious that Congress saw the proceedings on remand as ancillary to the civil action.[22]

II. PROCEEDINGS ON REMAND FROM THE DISTRICT COURT CONSTITUTE ADVERSARY PROCEEDINGS.

Even if the limitation in Title 5 U.S.C. § 504 applies on remand, the proceeding in this case was adversarial, without regard to whether the government was actually represented by counsel in the proceeding. If Title 5 U.S.C. § 504 applies to civil actions on remand, the sole question is the meaning of the phrase "adversary agency adjudication" in a remand proceeding.

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ceedings from the forecast. This is irrelevant to the interpretation of the statute for two reasons. First, a forecast is never intended to be precise. Proceedings on remand are only a small class of cases by comparison to the total number of Social Security proceedings and might simply have been excluded for forecast purposes. Therefore the budget office figures do not demonstrate that the costs at issue here were ever excluded. Second, and more important, it is a well-settled principle that substantive amendments should not be made to statutes by a budget bill, and most certainly not by a Congressional Budget Office forecast.

[22] Furthermore, although this amendment was rejected, the House Report section quoted above notes that in some circumstances fees may be available simply for obtaining a remand, and cites with approval cases where such fees were awarded. *MacDonald v. Schweiker*, 553 F. Supp. 536 (E.D.N.Y. 1982).

"Adversary agency adjudication," is defined as an adjudication where the position of the United States is represented "by counsel or otherwise." In this case, until he accepted the decision of the ALJ on remand, the position of the Secretary was that respondent was not entitled to disability benefits. It simply ignores reality to suggest that on remand, petitioner and respondent suddenly were in a non-adversarial posture.

When a claimant first appears before an ALJ, it is true that the agency has not staked out a position. But after the agency denies the claimant benefits, the situation is substantially different. Moreover, the situation does not change merely because the claimant has obtained a remand. At that point, for purposes of the EAJA, the claimant still has not overcome the government's unjustified position; that occurs only after benefits have been obtained. The notion that the government can take an unjustifiable position, then withdraw, and thereby deny the claimant the paid services of a lawyer on remand or at any other stage of a proceeding, finds no support either in the language of the statute or in its legislative history. Indeed, attorney for the claimant has no way of knowing that the government has abandoned its adversarial posture until the day of the hearing.

As previously noted, both in the 1980 and 1985 legislative history, Congress explicitly stated that "'if . . . the agency does take a position at some point in the adjudication, the adjudication would then become adversarial,' and thus be subject to the Act." 1985 House Report at 10, U.S. Code Cong. & Admin. News at 138. Congress recognized that the operative factor in deciding whether a proceeding is adversarial is whether the government ever takes a position in the proceeding. Once the government takes a position, the right under the EAJA to retain a lawyer and recover attorney fees arises, subject to the person seeking fees ultimately prevailing and demonstrating that the government's position

was substantially unjustified. When the government takes an unjustified position that must be overcome, it loses the ability unilaterally to return to the status quo prior to litigation and thereby cut off the claimant's right to fees. The check on attorney fees once the government has taken an adversarial litigation position is not a unilateral right of the government to withdraw, but rather the continuing requirement in the EAJA that the attorney's work be reasonably necessary.[23]

Petitioner argues finally that if respondent prevails it will open the floodgates for recovery of attorney fees in Social Security cases, and overburden the public fisc. This argument is specious. In the first place, it is already beyond dispute that attorney fees are available in "civil actions" to review adverse decisions in Social Security cases. To recover fees, however, a person must obtain benefits and demonstrate that the government's position was not substantially justified. The only impact of the availability of fees for legal services in remand proceedings is that the court must consider the reasonableness of those services along with the reasonableness of other legal services provided. It does not in any way increase the number of cases in which fees would be available.

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[23] The extent of legal services that would be reasonable on remand is left to the court's discretion under 28 U.S.C. § 2412(d)(1)(A). *Pierce v. Underwood*, 108 S. Ct. at 2541. The reasonableness of the services on remand in this case is not before the Court. Instead, petitioner argues that fees for services on remand are barred in all instances.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 20, 1989

REPLY

BRIEF

(5)

No. 88-616

In the Supreme Court of the United States

OCTOBER TERM, 1988

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ELMER HUDSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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24 pp

TABLE OF AUTHORITIES

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REPLY BRIEF FOR THE PETITIONER

The court of appeals held that respondent may recover attorney's fees under the Equal Access to Justice Act (EAJA) for the services performed by her attorney before the Social Security Administration (SSA) following the district court's remand of her Social Security disability claim to the Secretary for further proceedings. The basis of the court of appeals' decision was that the proceedings before SSA constituted an "adversary adjudication" within the meaning of the EAJA, 5 U.S.C. 504(b)(1)(C) (Supp. IV 1986), and that fees therefore could be awarded under Section 504(a)(1), which permits the award of fees to prevailing parties in such adjudications. See Pet. App. 11a-16a. We have shown in our opening brief (Gov't Br. 9-12, 18-26) that this holding is clearly incorrect, because

Section 504 was specifically drafted to exclude administrative proceedings on Social Security claims. Perhaps for this reason, respondent devotes only two pages of her brief to a defense of the court of appeals' rationale. See Resp. Br. 32-34. She instead relies principally on the alternative argument that the award of fees for services rendered by her attorney on remand could be supported by 28 U.S.C. 2412(d)(1)(A) (Supp. IV 1986). See Resp. Br. 11-32. Section 2412(d)(1)(A), however, provides for the award of attorney's fees only for services performed in *judicial,* not administrative, proceedings, and it therefore has no application here.

A.

1. Congress comprehensively addressed the question of the award of attorney's fees for services performed in administrative proceedings in 5 U.S.C. 504 (Supp. IV 1986). Section 504(a)(1) provides that "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." As relevant here, the term "adversary adjudication" is defined to mean "an adjudication under [5 U.S.C. 554] in which the position of the United States is represented by counsel or otherwise" (5 U.S.C. 504(b)(1)(C) (Supp. IV 1986)). The prerequisite that the government's position be "represented by counsel or otherwise" in turn has long been defined under the Administrative Conference's Model Rules issued pursuant to 5 U.S.C. 504(c)(1) (Supp. IV 1986) and implementing HHS rules to refer to adjudications in which the position of the agency "is presented by an attorney or other representative who

enters an appearance and participates in the proceeding" (46 Fed. Reg. 32,900, 32,912 (1981), codified at 1 C.F.R. 315.103(a); 48 Fed. Reg. 45,251, 45,253 (1983), codified at 45 C.F.R. 13.3(a).

Administrative proceedings on a claim for benefits under the Social Security Act do not satisfy the foregoing definition, because the government does not take a "position" on the claim and is not represented in those proceedings by an attorney or other representative who enters an appearance and participates in the proceedings. Moreover, as respondent and the court below have conceded (Resp. Br. 27-28; Pet. App. 13a), the limitation of Section 504 to "adversary adjudication[s]" was adopted in 1980 and retained in 1985 for the specific purpose of excluding Social Security claims from the coverage of Section 504. See Gov't Br. 18-22. And until the Eleventh Circuit's decision in this case, the courts of appeals had uniformly held that fees cannot be recovered for services performed in administrative proceedings before SSA. See Pet. 7; Gov't Br. 18. Respondent argues (Resp. Br. 33) that the exception for administrative proceedings under the Social Security Act does not apply to administrative proceedings on remand from the district court. But respondent points to nothing in the text or legislative history of Section 504 to suggest that Congress intended to afford different treatment to proceedings on remand.

2. Respondent also argues (Resp. Br. 33) that because the Secretary took the position in respondent's action for judicial review under 42 U.S.C. 405(g) that the Secretary's first decision denying her claim for benefits was correct, the Secretary must be deemed to have continued to take a position opposing her claim for benefits in the administrative proceedings following the district court's remand

order.[1] It is irrelevant, however, whether the Secretary once took a position in court on the correctness of a prior decision of the Secretary denying respondent's claim for benefits, because proceedings in court are covered by a different provision of the EAJA, 28 U.S.C. 2412 (1982 & Supp. IV 1986). The relevant question is whether counsel appeared to advance a position of the Secretary in the administrative proceedings themselves.

In this case, although the government defended the Secretary's first decision denying respondent's claim for benefits when respondent sought judicial review of that decision in court, the court of appeals concluded that the ALJ had erred in not considering the combined effect of several impairments (even those that were not severe) and had not sufficiently explained the weight she gave to certain evidence. The court of appeals therefore ordered that the matter be remanded to the Secretary for reconsideration (Pet. App. 15a-16a; see also *id.* at 33a-34a).[2] On remand, the Appeals Council *vacated* the ALJ's prior decision denying respondent's claim and remanded the case to an ALJ for further proceedings consistent with the court's order and for the submission of a recommended new decision (*id.* at 30a). Before the Appeals Council, the Secretary did not take the position on remand that respondent's claim should be denied. Nor did the Secretary appear through counsel or another representative at the ALJ hearing to advance that or any other position. The new hearing before the ALJ, like the first hearing, was non-adversarial, as contemplated by the governing regulations. See *Richardson* v. *Perales,* 402 U.S. 389, 403 (1971); *Heckler* v. *Campbell,* 461 U.S. 458, 471 & n.1 (1983) (Brennan, J., concurring). The effect of the Appeals Council's order vacating the ALJ's decision therefore was to place respondent in exactly the same position in which she had been before seeking judicial review—namely, with an opportunity for a non-adversarial evidentiary hearing before the ALJ under applicable legal standards (including, at the second hearing, the standards mandated by the court of appeals). And as in the prior administrative

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[1] Respondent asserts (Resp. Br. 21 n.15) that positions taken by the government in court were "available" to the ALJ in the proceedings on remand, but she offers no evidentiary support for that assertion. Although the orders and opinions of the courts presumably were available to the ALJ, we have been informed by HHS that the pleadings filed by the parties in actions for judicial review under 42 U.S.C. 405(g) are not ordinarily furnished to the Appeals Council or the ALJ when a case is remanded by the court.

[2] Because this case involved only one claimant, the Secretary elected not to seek further review of the court of appeals' holding that the Secretary was required to consider the combined effect of several unrelated and non-severe impairments prior to enactment of Section 4 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1800. The 1984 amendments required the Secretary to consider the combined effect of multiple impairments on a prospective basis, effective December 1, 1984. See 42 U.S.C. 423(d)(2)(C), 1382c(a)(3)(G) (Supp. IV 1986); *Bowen* v. *Yuckert,* No. 85-1409 (June 8, 1987), slip op. 11-14. It is the Secretary's position that the prior regulations did not require consideration of the combined effect of several unrelated impairments unless each impairment satisfied the threshold standard of "severity" that was sustained by this Court in *Yuckert,* and that those prior regulations were a valid implementation of the Social Security Act prior to the 1984 amendments. *A fortiori,* we believe that the Secretary's position on that issue in this case was "substantially justified" for purposes of the EAJA, especially since the court below acknowledged (Pet. App. 8a-9a) that it had sustained the Secretary's approach in a prior decision (see *McSwain* v. *Bowen,* 814 F.2d 617, 620 (11th Cir. 1987)). Although the merits of the combined-impairments issue are not before the Court in this case, the validity of the Secretary's pre-1984 approach remains a matter of substantial importance in the administration of the disability programs because a number of major class action suits challenging the Secretary's pre-1984 approach are still pending in the lower courts.

proceedings, respondent was not entitled to attorney's fees, because the Secretary did not appear through counsel or other representative to oppose her claim or to oppose her position on any issues that remained open for consideration at that hearing.

3. Respondent, like the court of appeals (see Pet. App. 14a), relies (Resp. Br. 28, 33) on a passage in the legislative history of the EAJA concerning Social Security claims, which states that " '[i]f * * * the agency does take a position at some point in the adjudication, the adjudication then becomes adversarial.' " H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 1, at 10 (1985), quoting H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23 (1980). However, especially when read in context, it is obvious that this sentence refers only to the matters occurring entirely within the confines of the *administrative* adjudication: the purpose of the sentence was only to make clear that fees may be awarded under Section 504 if the Secretary takes a position (through counsel or another representative) in the administrative adjudication on issues raised in that adjudication.[3] Nothing in the quoted sentence suggests that

[3] The relevant portion of the Conference Report on the 1980 Act states (at 23):

> The conference substitute defines adversary adjudication as an agency adjudication defined under the Administrative Procedures Act where the agency takes a position through representation by counsel or otherwise. It is intended that this definition precludes an award in a situation where an agency, e.g., the Social Security Administration, does not take a position in the adjudication. If, however, the agency does take a position at some point in the adjudication, the adjudication would then become adversarial.

Under this account, in order for an "agency adjudication" to "become adversarial," SSA must take a position, through counsel or another representative, "in the adjudication"—*i.e.*, in the *administrative* adjudication conducted by the agency.

fees would be available under 5 U.S.C. 504 (Supp. IV 1986) for services performed in a *non*-adversarial administrative proceeding simply because the Secretary might once have taken a position on different issues in prior proceedings in court—proceedings that are governed by a different provision of the EAJA, 28 U.S.C. 2412 (1982 & Supp. IV 1986). To the contrary, as respondent acknowledges (Resp. Br. 29-30), the only situation mentioned in the 1985 House Report in which fees might be available is when the administrative adjudication of a Social Security claim is covered by the EAJA due to the appearance of a representative of the SSA in the administrative adjudication itself (H.R. Rep. No. 120, *supra,* at 10 (emphasis added)):

> It is the committee's understanding that the Secretary of Health and Human Services has implemented an experiment in five locations in which the Secretary is represented at the hearing before the administrative law judge. *This is precisely the type of situation covered by section 504(b)(1)(C).* While generally, Social Security administrative hearings remain outside the scope of this statute, *those in which the Secretary is represented are covered by the Act.*

B.

Apparently recognizing the weakness of the court of appeals' rationale for awarding fees under 5 U.S.C. 504 (Supp. IV 1986), respondent devotes the bulk of her brief to the alternative argument that the court of appeals' award of fees for services performed in the administrative proceedings following the remand from the district court may be justified on the basis of 28 U.S.C. 2412(d)(1)(A) (Supp. IV 1986). See Resp. Br. 11-32. Section 2412(d)(1)(A) provides for the award to a prevailing party of "fees and other expenses * * * incurred by that party in

a civil action * * *, including proceedings for judicial review of agency action, brought by or against the United States * * *." Section 2412(d)(1)(A) by its terms applies only to services performed in a civil action in court. Nevertheless, relying on *Pennsylvania* v. *Delaware Valley Citizens' Council,* 478 U.S. 546, 559 (1986) (see Resp. Br. 17-19, 26), respondent argues that fees may be awarded under that section for services her attorney performed in the administrative proceedings following the district court's remand order because those proceedings may be considered part of (or ancillary to) the civil action under 42 U.S.C. 405(g). Even the court of appeals rejected this argument (see Pet. App. 12a), and properly so.

1. In *Delaware Valley,* the Court held that fees could be awarded for services performed by plaintiffs' counsel in administrative proceedings that the Court found to be reasonably necessary to enforce the terms of a consent decree entered in a citizens' suit under the Clean Air Act. 478 U.S. at 557-561. However, the attorney's-fee statute at issue in *Delaware Valley,* unlike the EAJA, did not contain a separate provision addressing the availability of fees in administrative proceedings. Accordingly, the court of appeals correctly concluded that "*Delaware Valley* is inapposite here," because "[t]he EAJA clearly distinguishes between judicial and administrative proceedings" and because Section 2412(d)(1)(A), upon which respondent relies, "is limited to judicial proceedings" (Pet. App. 12a).[4]

[4] Respondent's reliance (Resp. Br. 17-18 n.12, 22 n.16, 25) on *Webb* v. *Dyer County Bd. of Educ.,* 471 U.S. 234 (1985), is also misplaced. In *Webb,* the Court held that fees could not be recovered under 42 U.S.C. 1988 for services performed in administrative proceedings before a state agency, although the Court observed that fees might be available in other circumstances in which such services were reasonably calculated to lead to success in the civil suit. In this case, the services performed by respondent's attorney before SSA were not directed to an ultimate award of benefits by the court, but to an award by the agency itself in the non-adversarial proceedings conducted by the agency on remand from the court. In any event, 42 U.S.C. 1988, unlike the EAJA, does not separately address the subject of the availability of fees for services performed in administrative proceedings in a manner that precludes an award in a particular category of administrative proceedings (here, any such proceedings that are not "adversary adjudications").

The inapplicability of Section 2412(d)(1)(A) in this setting is evident from its text. That section provides for the award of fees and costs that are "incurred * * * in any civil action * * *, including proceedings for judicial review of agency action * * *." This language requires that the fees or expenses be incurred "in" the "civil action." The quoted language also distinguishes between "*judicial* review" and "*agency* action" and includes only the former in the scope of the term "civil action," for which fees may be awarded under Section 2412(d)(1)(A). This reading of Section 2412(d)(1)(A) is confirmed by Section 2412(d)(3), which provides that in an action for judicial review of an adversary adjudication conducted by an agency, the court may award fees and expenses incurred in the administrative proceedings to the same extent authorized by 5 U.S.C. 504(a) (Supp. IV 1986). Congress thus limited the power of a court to award fees for services performed in administrative proceedings—the relief respondent seeks in this case—to those situations in which the agency conducted an "adversary adjudication." Accord, 5 U.S.C. 504(c)(1) ("If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3).").

Respondent contends (Resp. Br. 22) that Section 2412(d)(3) has no bearing on the fees that she insists are independently available under Section 2412(d)(1)(A) for services performed in administrative proceedings on re-

mand from a court in a civil action for judicial review of agency action. But respondent offers no support whatever for her premise that Section 2412(d)(1)(A) independently authorizes such an award or for her assertion that Section 2412(d)(3) does not disturb that supposed authority. In any event, respondent's premise that Section 2412(d)(1)(A) authorizes the award in this case is clearly incorrect. In light of the principle that *any* award of fees and costs against the government is barred by sovereign immunity in the absence of an express waiver of that immunity (*Library of Congress* v. *Shaw*, 478 U.S. 310, 319 (1986)), the obvious inference to be drawn from Congress's express provision for a court to award fees for services performed before an agency only in certain limited circumstances under Section 2412(d)(3) is that Congress foreclosed such an award by a court in all other circumstances, including where, as here, the agency did not conduct an adversary adjudication. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982); cf. *Bowen* v. *Galbreath*, No. 86-1146 (Feb. 24, 1988), slip op. 3.

2. Respondent also is fundamentally mistaken in her view that the administrative proceedings before the ALJ and the Appeals Council following the district court's remand order were part of the civil action she had filed in district court under 42 U.S.C. 405(g). Under the Social Security Act, it is the Secretary, not a court, who has primary responsibility for adjudication of claims for disability benefits. See 42 U.S.C. 405(a) and (b), 423, 1383 (1982 & Supp. IV 1986). The courts have only a limited role to play, by entertaining actions under 42 U.S.C. 405(g) for judicial review (under narrow standards) of the final decisions of the Secretary denying claims for benefits, and the vast majority of claims are resolved without resort to the judicial process. Accordingly, when a district

court, on judicial review under 42 U.S.C. 405(g), remands a case to the Secretary for further proceedings, the court is returning the claim to the officer having primary jurisdiction over the claim. It necessarily follows that where, as here, the Secretary renders a decision in favor of the claimant in the administrative proceedings on remand and awards benefits to the claimant pursuant to that decision, the Secretary does not act, in the manner of a special master, as an agent of the court. The Secretary exercises his *own* statutory authority under 42 U.S.C. 405(b) or 1383(c) (1982 & Supp. IV 1986), just as he does when he renders a decision in favor of the claimant in the first round of administrative proceedings, before the claimant has had any occasion to seek judicial review.[5]

This statutory arrangement was respected in this case. The district court remanded the case "to the Secretary for further consideration" (Pet. App. 34a) under the Secretary's own authority. Thereafter, it was the Appeals Council, not the district court, that rendered the decision in favor of respondent (*id.* at 23a). Contrary to respondent's contention (Resp. Br. 18), the Appeals Council's decision on remand was not then affirmed by the district court. Instead, following the Appeals Council's decision, the district court entered an order on December 1, 1986, *dismissing* respondent's action for judicial review, because the Secretary's award of benefits to respondent on remand rendered further judicial proceedings unnecessary. App., *infra*, 1a-2a. This sequence of events confirms that respondent's action for judicial review of the Secretary's decision

[5] This Court emphasized the distinction between primary administrative authority and limited judicial review in another case concerning a remand from a reviewing court to an agency. See *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940). See also *Heckler* v. *Lopez*, 463 U.S. 1328, 1337-1338 (1983) (Rehnquist, Circuit Justice).

denying her claim for benefits was effectively terminated on the merits when the district court remanded the case to the Secretary on July 24, 1985.

3. Respondent contends (Resp. Br. 13-14), however, that the administrative proceedings on remand must be considered part of the judicial action because a cou t does not make a final disposition of the case for EAJA purposes until after proceedings have been completed on remand. Once again, respondent misapprehends the statutory scheme.

a. Where a court reverses or modifies the Secretary's decision denying a claim for benefits and remands the case to the Secretary for further proceedings, the claimant is not yet a "prevailing party" in the judicial proceedings for purposes of the award of fees under the EAJA. Under established precedent, the claimant cannot recover fees and expenses incurred in the judicial proceedings under 42 U.S.C. 405(g) unless he thereafter is awarded benefits in the administrative proceedings on remand (or in subsequent judicial proceedings under 42 U.S.C. 405(g) if the claim is again denied by the Secretary on remand). In order to assure that a claimant is not foreclosed from recovering fees under Section 2412(d)(1)(A) at a later date, the courts have held that the district court may retain jurisdiction following a remand, at least for purposes of awarding attorney's fees under Section 2412(d)(1)(A) if the claimant ultimately is successful, and that the time for filing a petition for fees under Section 2412(d)(1)(A) therefore does not begin to run until after a motion or other filing is made in the district court that formally notifies the court of the favorable decision of the Secretary on remand.[6] See *Brown* v. *Secretary of Health and*

[6] If, however, the remand is solely for the calculation of the benefits due (see, *e.g.*, *Martindale* v. *HHS*, No. CA-87-AR-5367-NE (N.D. Ala. Nov. 30, 1988), appeal pending, No. 89-7105 (11th Cir.), it is clear at that point that the claimant is the EAJA "prevailing party," so that the time for filing a petition for fees runs from the date of the remand.

Human Services, 747 F.2d 878, 883-885 (3d Cir. 1984); *Guthrie* v. *Schweiker,* 718 F.2d 104, 106 (4th Cir. 1983). Congress endorsed this practical solution to the award of fees when it reenacted the EAJA in 1985. See H.R. Rep. No. 120, *supra,* at 19-20, *quoted in* Resp. Br. 30-31; see also S. Rep. No. 586, 98th Cong., 2d Sess. 21 (1984). However, the fact that Congress, as a procedural matter, authorized a court to make a delayed award of fees and other expenses incurred in pre-remand judicial proceedings under 42 U.S.C. 405(g) does not render the post-remand administrative proceedings part of the judicial action. Congress's solution therefore does not authorize a court to make an award under Section 2412(d)(1)(A) of fees and other expenses incurred by the claimant in the administrative proceedings on remand. Indeed, the House Report unambiguously forecloses that result. After discussing the practical solution fashioned by the *Guthrie* and *Brown* courts to the award of fees in Social Security cases that are remanded to the Secretary, the House Report states that "the only fees which will be available will be for those activities undertaken in connection with the judicial proceedings and not those associated with the administrative proceeding." H.R. Rep. No. 120, *supra,* at 20.

Respondent attempts to explain away this decisive legislative history by asserting (Resp. Br. 31 n.20) that the sentence in the House Report excludes only fees for services performed in an agency proceeding that took place prior to the filing of the action for judicial review, not services performed in agency proceedings following the order of remand. As with respondent's other efforts to

avoid the consequences of Congress's deliberate decision to exclude administrative proceedings on Social Security claims from coverage under the EAJA, respondent offers absolutely no support for her notion that the House Report distinguishes between "prior" agency proceedings and agency proceedings following a remand from the district court. On its face, the language of the House Report is all-inclusive and applies equally to both. In addition, the very subject of the passage in the House Report was the remand of Social Security cases and the action that might be taken by the district court following the Secretary's decision on remand. It therefore is especially clear that the House Report had agency proceedings on remand specifically (if not exclusively) in mind when it stated that fees for activities "associated with the administrative proceeding" would not be available under Section 2412(d)(1)(A).

b. Moreover, in arguing that administrative proceedings on remand are part of the judicial proceedings under 42 U.S.C. 405(g), respondent erroneously relies (Resp. Br. 13-14) on language in 42 U.S.C. 405(g) that is inapplicable to this case. Specifically, respondent quotes a portion of the sixth sentence of Section 405(g) that provides that the court "may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding"; the sixth sentence then further provides that after the case is remanded and after hearing additional evidence, the Secretary shall modify or affirm his findings of fact and decision and shall file them with the court. Respondent argues that this procedure suggests that the proceedings on remand are merely ancillary to the judicial proceedings and that the district court does not finally dispose of *any* remanded case until after the Secretary files modified or

additional findings and a new decision with the district court and the court then affirms, modifies, or reverses that decision. Contrary to respondent's reading, however, the procedure she cites applies only where the district court remands the case to the Secretary—typically at an interlocutory stage of the judicial proceedings—to allow the Secretary to receive newly discovered evidence, so that the court will have the benefit of a complete record when reviewing the decision of the Secretary. That was not the basis of the remand in this case. Neither the court of appeals nor the district court made any mention of newly discovered evidence, and neither ordered the Secretary to receive new evidence or to file anything further with the district court after the remand.

Of course, even if this case *were* governed by the sixth sentence of Section 405(g), that would not in any way alter the applicable EAJA analysis. Respondent would still have no entitlement to fees for proceedings conducted by the agency on remand because they would not be "adversary adjudication[s]" within the meaning of Section 504, and Section 2412(d)(1)(A), for the reasons previously given (see pp. 9-10, *supra*), would not authorize fees for any services that were not performed in court as part of the "civil action" itself. In any event, it is clear that this case is not governed by the sixth sentence of Section 405(g). The court of appeals reversed the Secretary's decision *on the merits* and only then remanded to the Secretary for further proceedings, in which the ALJ would consider the combined effect of several impairments and explain the weight to be given to evidence that was already in the record. Section 405(g) does not require the Secretary to file modified or additional findings and a new decision with the district court in these circumstances, because, unlike the cases involving a remand for the receipt of new

evidence, the court has completed its review of the Secretary's decision. Such cases are governed by the fourth sentence of Section 405(g), which provides that the court shall have the power to enter, upon the pleadings and transcript of the administrative record, "a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause [to the Secretary] for a rehearing." The eighth sentence of Section 405(g) then provides that "[t]he judgment of the court shall be final except that it shall be subject to [appellate] review in the same manner as a judgment in other civil actions."[7] The fourth and eighth sentences of Section 405(g) thus make clear that an order of the district court that modifies or reverses the Secretary's decision on the merits and remands for a "rehearing" is a "final judgment" that effectively terminates the proceedings for judicial review of the particular decision of the Secretary that was modified or reversed.[8] After the remand, the Secretary

[7] Congress recognized the distinction between the two types of remands when it amended Section 405(g) in 1980 to restrict the circumstances in which a court may remand a case for further action on the motion of the Secretary or on its own motion. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 307, 94 Stat. 458; see H.R. Rep. No. 100, 96th Cong., 1st Sess. 13 (1979); see also S. Rep. No. 408, 96th Cong., 1st Sess. 59 (1979); H.R. Conf. Rep. No. 944, 96th Cong., 2d Sess. 58-59 (1980).

[8] In *Cohen* v. *Perales*, 412 F.2d 44, 48 (5th Cir. 1969), rev'd on other grounds *sub nom. Richardson* v. *Perales*, 402 U.S. 389 (1971), the court of appeals noted the distinction between the two types of remand orders under 42 U.S.C. 405(g) and relied on the "final judgment" language in Section 405(g) in holding that the Secretary could take an appeal under 28 U.S.C. 1291 from the order of the district court that reversed the decision of the Secretary and remanded the case to the Secretary for further proceedings applying different legal standards. The court also reasoned that if the Secretary could not appeal the remand order, he might be effectively foreclosed from challenging the district court's legal rulings. This Court did not advert to the jurisdictional issue in its opinion in *Richardson* v. *Perales*, but because the issue was discussed in the opinion under review and because the jurisdiction of this Court under 28 U.S.C. 1254(1) depended on whether the case was properly "in" the court of appeals under 28 U.S.C. 1291 (see *United States* v. *Nixon*, 418 U.S. 683, 690, 692 (1974)), the Court presumably was satisfied that the court of appeals had correctly resolved the jurisdictional issue.

Notwithstanding the language of 42 U.S.C. 405(g), the Fifth Circuit's decision in *Cohen* v. *Perales*, and the practical considerations weighing in favor of appealability, some courts of appeals have held that the Secretary cannot appeal an order of the district court that reverses a decision of the Secretary on the merits and remands for further proceedings. See, *e.g.*, *Finkelstein* v. *Bowen*, No. 88-5318 (3d Cir. Mar. 3, 1989); *Harper* v. *Bowen*, 854 F.2d 678 (4th Cir. 1988); but see *Daviess County Hospital* v. *Bowen*, 811 F.2d 338 (7th Cir. 1987). But whatever the ultimate resolution of the appealability issue, the administrative proceedings on remand are not part of the civil action under 42 U.S.C. 405(g).

will enter a new decision, which, if it is adverse to the claimant, will then be independently subject to judicial review under Section 405(g).

Where, as here, the Secretary's new decision on remand is favorable to the claimant, it of course is appropriate for the Secretary to file that decision with the district court, so that the court may consider whether the claimant should be awarded EAJA fees for the work performed by his attorney in the judicial proceedings that led to the remand. But in that event, it is the decision of the Secretary on remand, not any subsequent order of the court, that renders the claimant a prevailing party and thus supplies the basis for the award of benefits to the claimant for the earlier judicial proceedings. The sixth sentence of 42 U.S.C. 405(g) therefore lends no support to respondent's position in this case that the administrative proceedings following the remand from the district court were actually part of the civil action under Section 405(g).

4. Finally, contrary to respondent's contention (Resp. Br. 24), the result mandated by the text and legislative

history of the EAJA does not bar a claimant from retaining a lawyer to assist him in administrative proceedings on remand or require the attorney either to assume an undue risk that he will not be paid or to stand aside while the claimant presents his claim on his own. Although fees for services performed in administrative proceedings are not available under the EAJA, the attorney may recover fees under 42 U.S.C. 406 out of past-due benefits awarded to the claimant in Title II cases. See *Bowen* v. *Galbreath,* No. 86-1146 (Feb. 24, 1988), slip op. 1-3. Congress was aware of this alternative mechanism when it reenacted the EAJA in 1985, and, in order to avoid duplicative fee awards for services performed in court, it adopted a mechanism for the coordination of payments under 42 U.S.C. 406(b) and the EAJA for such services. See Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186. The absence of any similar coordinating provision with regard to 42 U.S.C. 406(a)—which authorizes fees for services in the administrative proceedings—suggests that Congress did not believe that EAJA covered fees for such proceedings.

* * * * *

For the foregoing reasons and the additional reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed insofar as it holds that respondent may recover fees and other expenses incurred in the administrative proceedings following the order of remand from the district court.

WILLIAM C. BRYSON
Acting Solicitor General

APRIL 1989

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

Civil Action No. 83-A-0632-J

ELMER HUDSON, PLAINTIFF

v.

OTIS R. BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES, DEFENDANT

[Filed Dec. 1, 1986]

ORDER

Upon motion of the defendant and for good cause shown,

It is ORDERED, ADJUDGED and DECREED that this action be and the same hereby is dismissed, that on further consideration by the Secretary of Health and Human Services, after remand by this Court in its Order of July 24, 1985, the relief prayed for by the claimant has been granted and benefits prayed for have been awarded.

It is further ORDERED, ADJUDGED and DECREED expressly that such dismissal is without prejudice to the right of counsel to present a fee petition to the Court praying that an attorney fee be judicially awarded for legal services rendered in preparation for the conduct of this

proceeding in this Court, in the event that an allowance of reasonable attorney fees for legal services in proceedings before the Secretary is not awarded administratively within a reasonable time hereafter; and the Court specifically retains jurisdiction hereof for that limited purpose.

It is further ORDERED that the costs of Court be taxed against the defendant.

DONE, this 1st day of Dec., 1986.

/s/ Clarence W. Allgood, Sr.
United States District Judge

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